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PROPOSAL FOR CLASS ACTIONS

UNDER

COMPETITION POLICY LEGISLATION

DAMAGES CLASS ACTION UNDER THE COMBINES INVESTIGATION ACT

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THE CASE FOR CLASS ACTIONS IN CANADIAN COMPETITION POLICY: AN ECONOMIST'S VIEWPOINT.

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PREFACE

This study examines the procedure known as the class action in the context of the plan to introduce a damages remedy for individuals who have been injured as the result of a violation of Part V of the Combines Investigation Act.

The proposal for a damages remedy is contained in a bill to amend the Act presently before Parliament, Bill C-2. The bill also contains amendments which will change some of the existing offences under Part V and create new offences. The study of the class action has been carried out on the assumption that Bill C-2 with its new damages remedy and amendments to Part V will in due course become law. The assessment of the utility of a class action procedure in enforcing the damages cause of action therefore focuses upon the Part V offences as they will exist once Bill C-2 is enacted. The completion of Stage II of the Government's review of competition policy might well produce further changes in the substantive Part V offences, but these are matters beyond the scope of the paper.

Though the study is premised on the anticipated enactment of Bill C-2, one comment about possible future amendments to the legislation is appropriate. For loss resulting from the commission of a combines offence the court will be able to award damages, but it will have no power to grant other forms of relief such as a declaration, an injunction, the rescission or cancellation of a contract or the restitution of money or property, whether granted in addition to or in substitution for a damages award. If, when Bill C-2 becomes law, experience in litigation under the Act shows that in certain situations these other forms of relief would provide more suitable redress than just damages, it will be time to consider amending the legislation to authorize the courts to make the necessary orders.

Finally, the report assumes that both the substantive offences of Part V and the damages cause of action for an infringement that will exist when Bill C-2 is enacted are valid constitutionally. A class action is but a procedural vehicle for effectuating the enforcement of substantive rights and obligations. The device can have no independent existence if subsequently the courts determine that the Bill C-2 provisions are beyond the legislative competence of Parliament.

CONTENTS

I. PURPOSE AND PLAN OF REPORT

The amendments to the Combines Investigation Act that are proposed by Bill C-2 contain a provision that will give the victim of an anti-competition offence a civil damages remedy against the offender. The statutory remedy will be entirely new. Any person who has suffered loss or damage as a result of the commission of an offence against Part V of the Act can recover compensation in a court of competent jurisdiction. The remedy is also available for damage resulting from a failure to comply with an order of the Restrictive Trade Practices Commission or of a court under the Act.

The purpose of this report is to examine the procedural device known as the class action and to assess what contribution the procedure could make to the enforcement of the newly-created damages remedy. The report concludes that in a number of situations the presentation of damages claims by means of a class action would advance the underlying competition objectives of the legislation. It recommends that a class action procedure be incorporated in the Act and sets out draft legislative proposals for a scheme suited to the statutory remedy. If enacted, the proposals would take the form of an amendment to the principal Act.

This first chapter of the report is intended as a guide to the reader to the contents of the chapters that follow.

Since the subject of the study is the enforcement of the damages remedy by the procedure of a class action, the appropriate starting point is the damages cause of action itself. Chapter II therefore examines the provision that creates the damages remedy, section 31.1. It compares the section with previous legislative proposals and analyzes the constituent elements of the new cause of action, namely, the proof of the commission of a Part V offence, causation or the relation between offence and injury, and, finally damages.

The class action concept will not be familiar to many readers and so Chapters III and IV describe the procedure and trace the history of its development to the present time. This review will disclose that a procedure that was devised in England several centuries ago to save defendants from the embarrassment of multiple litigation over an identical question now has another rationale. Today the class action is seen as an instrument for securing relief for a large number of people where by reason of the small size of the claims few individuals would have sued for themselves. But while the class action can facilitate the litigation of small claims, this does not represent the sole justification for importing the procedure into the combines legislation. The procedure will also prove valuable where claims are more substantial, for example, where a number of small businessmen have been damaged in their trade by the anti-competitive behaviour of a rival enterprise or by a supplier. The collective presentation of claims will promote constructive co-operation among the businessmen in preparing for trial against the common adversary. Assistance to the same extent would probably not be forthcoming if one businessman sued just for himself, unless by arrangement with the others the action was to be treated as a test case.

Chapter III describes some important characteristics of class action practice, in particular, the self-appointed role of the representative plaintiff and the absence of any requirement of notice to the class, and assesses the risk of prejudice to members of the class if a class action fails. Chapter IV gives some examples, one from an actual case and the others hypothetical to demonstrate the utility of the class action in obtaining mass relief for damage resulting from business irregularity, especially anti-competitive activities. Chapter IV concludes by examining the prospects for successfully bringing a class action in Canada today and compares the situation in the United States.

Chapter V returns to the damages cause of action and examines it in the context of the combines legislation. An award of damages for a combines offence will bring compensation to the person who was injured and deny the defendant the rewards of its own wrongdoing. In addition, the award may deter others from committing the same offence, provided the damages awarded are sufficiently high. Since a criminal prosecution by the Crown for a competition offence has deterrence as an objective also, the civil damages remedy thus has the potential for supplementing the criminal law process in securing compliance with the combines laws. The private antitrust suit has in fact performed this function in the United States. Budget constraints which restrict the enforcement activities of the responsible government agencies and the fixing of fines on conviction for antitrust violations that are not adequate to deter are factors that have contributed to the significant position private antitrust has assumed in the United States. A similar role can be envisaged for the damages action in Canada if the resources appropriated to the enforcement of the combines legislation are not raised significantly above present levels.

Chapter VI studies two distinctive features of antitrust litigation in the United States that have helped encourage the growth of private actions -- treble damages and the immunity of the plaintiff from costs liability if the action fails. In the United States a plaintiff who loses his action will not be ordered to pay costs to the defendant, and in antitrust litigation his lawyer will normally be entitled to a fee for his services on a contingency basis. By this arrangement the lawyer will only receive a fee if the action is successful, the fee to be recovered out of the damages awarded against the defendant. By contrast to the American situation in antitrust, the plaintiff suing under the Combines Investigation Act for damages will recover just his actual loss. Also, as the law exists at present,

he will be liable potentially for two sets of costs. If the action is defeated, the plaintiff will be ordered to pay costs to the defendant and he will be responsible for his own lawyer's fee. The threat of double costs liability in the event of defeat is a real obstacle to litigation of any kind, particularly if the claim is not large. The individual with a small claim has no economic incentive to sue and even trebling the amount would not be likely to make litigation more attractive. This has important consequences in the combines context since the commission of an offence against Part V could injure many people. If no individual will sue for just a small amount, the defendant will be left holding the profits for numerous transactions and others will not be deterred. A class action, by collecting a multitude of separate claims in a single proceeding, could prevent this situation.

How a class action for damages could aid the enforcement of the combines legislation, particularly when individual claims are only small, is the subject of Chapter VII. The chapter notes, however, that due to the limited scope allowed to the class action procedure by courts in Canada, it can be anticipated that they will not permit actions to be brought to enforce the statutory damages remedy on a class basis. Legislation to remove this restriction is therefore recommended.

Chapter VIII concludes that the prospective litigant with a small claim, faced with potential liability for two sets of legal costs, has no more incentive to sue as the representative of a class than he would have to sue for himself. Thus, even assuming that legislation was enacted to allow class actions for damages to be brought, it is doubtful whether any member of a potential class would take the initiative to bring a class action unless his own claim was sufficiently substantial to warrant taking the risk. The freedom of the plaintiff from liability for costs explains the development of class actions for antitrust violations in the United States and the

chapter stresses that the utility of the class action procedure in enforcing the damages remedy in this country will be impaired unless the present costs disability of the class action plaintiff is removed.

Chapter IX explores several possible schemes for relieving the prospective class action plaintiff of his concern about costs. Immunity from liability for the defendant's costs in the event the action is defeated is a central feature of all the proposals. What distinguishes them is the method of paying the fee of the plaintiff's own lawyer. The report recommends a contingency fee arrangement in preference to a system of government funding since it is not appropriate that the ability of a citizen to sue for a combines offence should be dependent on Federal aid. It is proposed that the contingent fee should be fixed by the court, the amount to reflect the contingent nature of the fee. Finally, the chapter examines a possible third alternative for providing the plaintiff's costs. This proposal is modelled on the costs rule that usually applies in litigation. The lawyer for plaintiff or defendant will normally be entitled to a fee whatever the outcome of the action. If his client is successful, most of the fee will be paid by the other party. Since the lawyer will get a fee, win or lose, the amount will be less than if the entitlement was contingent upon success. According to the third alternative, the plaintiff's lawyer will not be paid unless the action succeeds, but the fee will be calculated as if it were payable in any event. In short, the lawyer is to perform his services for a contingent fee but the contingency factor is to be disregarded when the size of the fee comes to be assessed. The report rejects this approach on the ground that it does not give the lawyer a sufficient incentive to act for a class action plaintiff.

Part V of the Combines Investigation Act establishes a number of offences, and for a breach of these provisions section 31.1 will provide

a damages remedy for consequential loss. Chapter X closely examines the different Part V offences for the purpose of analyzing what the damages plaintiff will need to prove in order to recover compensation. The survey also gives examples of Part V violations that are likely to have injured a number of individuals in the same way. These situations will demonstrate the value of a class action in bringing compensation to all the victims of the offence in a single proceeding.

Chapter X indicates that on occasions it might not be possible to realize the compensation objectives of a class action if by reason of such factors as the large membership of the class, the anonymity of individual members and the small size of their claims, it will be difficult to distribute damages among the entire class, except at considerable expense. Chapter XI explores this problem in greater depth. As one solution, it suggests that the court be allowed to halt a class action if it is clear at the start that it will not be practicable to get compensation to a substantial proportion of the class membership. On the other hand, there will be situations where the total amount of damage inflicted by the defendant's violation can be calculated with reasonable accuracy, even though a distribution of damages to the majority of individual class members cannot be achieved. Chapter XI proposes an alternative approach for the court in this type of class action. Rather than simply refuse to allow the proceedings to continue as a class action, the court should order the defendant to pay the total damage amount into court. This fund would first meet the claims of class members who were already identified or who could be identified without difficulty, and the balance remaining could in the discretion of the court be applied for a purpose that would benefit indirectly members of the class and possibly other similarly situated persons. The imposition of damages liability on the defendant as if each victim had actually recovered compensation would fulfill the deterrent potential of a class action.

The report advocates this total damages recovery approach in the case of a class action that otherwise is administratively unmanageable and where it is practicable to assess the loss to the class as a whole. Nevertheless, the draft legislation that concludes the report does not require the court to assess damages on a total class basis in order to preserve the proceedings from dismissal. Instead, the court is left free to reject total damages assessment and thus to terminate the action at the outset on the ground that it is unmanageable.

Though the report does not recommend that the court be directed to award total damages against the defendant whenever liability can be so calculated, it recognizes the deterrent value of a damages award that is the equivalent of the aggregated sums that individual class members would have recovered had they sued separately. The report therefore proposes that if damages as a whole can be determined and a class action is dismissed as administratively unworkable, a public official ought to be allowed to bring an action for the damages. If in that action the court finds that the defendant had committed a Part V violation, it will be required to assess the total damages and to order the defendant to pay the amount into the Consolidated Revenue Fund. The report recommends that the Director of Investigation and Research be given standing to bring the action and that the Director have a discretion whether to sue or not. Under this proposal, compensation, even indirectly, of the persons injured by the Part V offence ceases to be an objective of a damages action. However, the objectives of preventing unjust enrichment and deterrence are preserved.

The statutory amendments in Bill C-2 that will introduce the damages remedy also propose that the Federal Court and the courts of the provinces are to have jurisdiction to entertain an action. The jurisdiction of federal and provincial courts will be concurrent. If a class action procedure were incorporated in the legislation, the same courts

would share jurisdiction in a class action to enforce the damages remedy. However, in Chapter XII the report recommends that the Federal Court should have exclusive jurisdiction over damages claims, whether the action is brought for individual damages or on behalf of a class. This would require a change to the amendment proposals of Bill C-2 that are already before Parliament. The report favours exclusive jurisdiction for the Federal Court for the reason that if jurisdiction is shared with provincial courts there is a danger that a defendant will be exposed to multiple actions brought simultaneously for the same alleged competition offence in different courts. By gathering all damages litigation into the unified federal system of courts, any separate actions that are brought against the same defendant arising out of the same anti-competitive behaviour can be regulated in such a way that an adjudication in a single action might be made to dispose of the issues in the other actions, thus avoiding the necessity for numerous proceedings. The scheme will also facilitate the distribution of damages in a class action when all the members of the class do not reside in the same province.

As an alternative to giving the Federal Court exclusive jurisdiction in all damages claims, the report recommends that the court should at least have sole jurisdiction for class actions. A class action plaintiff can sue on behalf of all persons who have a common interest whether they reside within or outside the territorial jurisdiction of the court in which the action is brought. If several class actions are brought in different jurisdictions against the same defendant, the classes may overlap, that is, some class members will be represented in two or more actions. In this situation there is clearly a danger of double recovery. Also, where a class action is brought in a provincial court and not all the class members are residents of the province, damage distribution among the non-residents is likely to present problems. By contrast, the jurisdiction of the Federal Courts is Canada-wide and there would not be the same difficulties.

The final chapter, the Appendix, contains the statutory provisions that are proposed for introducing the class action procedure. Each provision is followed by an explanatory note, except where it has been described previously in the text of the report.

II. THE DAMAGES REMEDY

Existing Laws and Previous Proposals

At present the Combines Investigation Act itself gives no right to sue for damages and an individual injured by the commission of an offence can only recover damages if a remedy exists at common law independently of the statute. Misleading advertising, for instance, is a practice prohibited by Part V of the Act for which damages might be recovered at common law, while such proscribed activities as monopoly, merger, price discrimination and inducing a refusal to supply are generally not actionable apart from statute. If enacted, Bill C-2 will change this situation. Section 31.1 will give a damages remedy for loss resulting from any Part V violation, that is, whether the prohibited conduct was actionable at common law or not. Thus, for activities not presently within the protection of the common law, the section will confer a right to damages where none existed before.

Damages recovery for an anti-competition violation was proposed first in Bill C-256,[1] which was introduced in the House of Commons in June 1971 but never enacted. The Bill C-2 provision is different from the original in two respects. First, damages can be awarded only in a civil action brought by the person injured, whereas Bill C-256, as an alternative to this mode of recovery would have allowed a criminal court on convicting for an offence to award compensation.[2] Secondly, damages are to be calculated according to the loss actually sustained. Under the former proposal, the victim of the violation was entitled to an amount equal to double the amount of the proved loss or damage.[3] Double damages was the remedy whether the award was made in a civil action or following a conviction in criminal proceedings.

In allowing multiple damages, the Bill C-256 provision resembled the damages remedy under the United States antitrust law. Section 4 of the Clayton Act provides that: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue... and shall recover threefold the damages by him sustained...".[4] The award of treble damages is a feature of antitrust litigation that in the United States is regarded as having enhanced the utility of the private suit as a measure of antitrust enforcement. The prospect of receiving three times the damage actually suffered offers the antitrust offence victim a strong incentive to sue and the threat of such a large liability is a deterrent to potential offenders. It remains to be seen whether in Canada the restriction of recoverable damages to actual loss will impair the effectiveness of the private action when compared with the procedure in the United States.

Present Proposal

If Bill C-2 is enacted, section 31.1(1) will provide that: "Any person who has suffered loss or damage as a result of (a) conduct that is contrary to any provision of Part V, or (b) the failure of any person to comply with an order of the Commission or a court under the Act, may in any court of competent jurisdiction sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him...".

Part (a) of section 31.1(1) relates to offences against Part V of the Act which contains provisions that prohibit a number of practices considered to be detrimental to competition, including conspiracies to fix prices or to prevent or limit competition, bidrigging, mergers and monopolies, price discrimination, and price maintenance. Other practices that are proscribed in Part V affect consuming members of the public more directly. These include misleading

advertising, multiple-ticketing, pyramid and referral selling, bait and switch selling, sales above advertised price, and promotional contests.

Part (b) of section 31.1(1) relates to orders of the Restrictive Trade Practices Commission or of a court under the Act and gives a damages remedy for loss sustained as a result of non-compliance. In the case of an order of the Commission, the failure to comply is itself an offence against the Act (s.46.1). The Commission orders in relation to which an action under section 31.1(1)(b) can be brought are orders under Part IV.1 of the Act relating to certain specified trade practices such as refusals to deal, exclusive dealing and tied selling. In the case of orders of a court under the Act, the orders to which section 31.1(1)(b) applies include those made under a specific provision of the Act, for example, an order in relation to patents and trademarks (s.29), and an order, made after conviction for a Part V offence, which prohibits the defendant from continuing or repeating the offence (s.30).

In examining for this report the application of the class action procedure to the damages cause of action created by section 31.1, it is convenient to refer to the cause of action simply as a damages claim for a Part V offence or a competition offence rather than continually to distinguish between a claim based on an offence and a claim following the breach of a Commission or court order. The general expression sufficiently covers a cause of action arising in consequence of either event and only when the context so requires will a more specific description be used.

Independent of Criminal Prosecution

The commission of an offence which causes damage is the gist of the claim for compensation under section 31.1 of the Act. However, it will not be necessary that the offender should first have been convicted of the offence before damages can be recovered. A damages action is independent of any criminal prosecution by the Crown, and damages may be awarded either before or after conviction, and even though criminal proceedings are never brought. To recover damages, however, the plaintiff must establish that the defendant did commit a Part V offence. If the defendant was previously convicted for the offence relied on by the plaintiff, the statute assists the plaintiff by making the conviction evidence of the fact that the defendant actually committed the offence.[5] It will therefore be to the advantage of the plaintiff to await the outcome of any pending criminal prosecution before either commencing or continuing his own proceeding.

Elements of Cause of Action

It is rather a novel step for the legislature to give a civil damages remedy for loss caused by conduct that is prohibited by statute where no damages could be recovered at common law, and there are few precedents in Canada for the remedy that Bill C-2 will bring into existence.[6] It is therefore difficult to predict with any certainty how the remedy will work in practice and its full scope will not really be known until the courts consider actual cases. However, at least some indication of what the courts will hold to be the essential ingredients of the cause of action can be gained from the plain language of section 31.1 and United States' experience with section 4 of the Clayton Act, a broadly similar provision. To recover damages the plaintiff will have to establish (1) a violation of the Act, i.e., the commission of Part V offence (or non-compliance with an order of the Commission or a court); (2) an injury resulting from the violation; and (3) the amount of damages.[7]

A number of quite difficult substantive and procedural questions have been encountered in private antitrust litigation in the United States and some have yet to be resolved. It can be expected that Canadian courts will have to consider similar problems and the American treatment should provide a valuable guide. At this juncture the probable difficulties can only be identified, their resolution lies in the future.

Proof of an Offence

Proof of the commission of a competition offence is one problem that can be anticipated. What amount of evidence will the civil action plaintiff need to present to the court to establish a violation of the Act? Presumably, the plaintiff will not have to prove the commission of the offence beyond a reasonable doubt, the state of persuasion necessary for a guilty verdict in a criminal prosecution, and that proof according to the lighter civil standard of satisfaction on a preponderance of probabilities will be sufficient. Where the defendant was previously convicted of the Part V offence, section 31.1(2) will assist the plaintiff in the civil action by making the trial record in the criminal prosecution evidence that the defendant committed the offence. The section also makes the record evidence of the effect of the offence on the plaintiff, that is, of the connection between the offence and the alleged injury.[8] However, it is not clear what part of the record in the criminal trial can actually be relied on. The fact of conviction is certainly admissible in the civil action but whether the testimony of witnesses and any documentary evidence received in the course of the criminal trial can also be considered is a question that will have to be decided.

Causation

Causation, the connection between the Act violation and the injury alleged, is a problem that Canadian courts are bound to encounter. To recover damages the plaintiff will have to show that he suffered loss or damage "as a result of" the Part V offence. That there must be a casual relationship between the violation and the damage alleged is clear; how close that connection must be is the real issue.

The United States has the same causation requirement for damages recovery and the courts over a long period have tried to devise a test for determining the sufficiency of the connection between violation and injury. The verbal formulation that has been developed draws a distinction between injuries that are direct and proximate and injuries so remote or incidental that a plaintiff has no standing to sue in respect to them. In deciding whether the offence was the proximate cause of the injury complained of a number of courts have adopted what is called the target area doctrine. The plaintiff has to show that "he is within the area of the economy which is endangered by a breakdown of competitive conditions in that particular industry. Otherwise he is not injured 'by reason' of anything forbidden in the antitrust laws."[9]

In United States' antitrust litigation the causation question has been especially prominent in damages suits against the supplier of a product for price overcharging where the supplier holds a monopoly position in the market or is a party to a conspiracy with others in the market to fix prices. The essence of the overcharge complaint is that the plaintiff paid more for the product than what would have been the price absent the monopoly or conspiracy. The price excess is the measure of damage. In Hanover Shoe Inc. v. United Shoe Machinery Corp.,[10] the United States Supreme Court held that the immediate purchaser from the antitrust offender could recover the overcharge

as damages even though he had passed on the overcharge to others in the chain of distribution and suffered no actual loss. The Court thus rejected what had been termed the passing-on defence. The question not decided in Hanover was whether indirect purchasers from the antitrust violator, the ultimate consumers who actually bore the overcharge, were entitled to damages. If both direct and indirect purchasers are able to recover for the same overcharge, there is a risk of double liability, and the initial response of courts after Hanover was to deny recovery to anyone except direct purchasers. Recently, however, some courts have extended standing to sue to ultimate consumers, though the approach has been cautious since it is recognized that the defendant might be prejudiced.[11] It is too early to predict how the courts will eventually accommodate the conflicting interests of the different parties.

United States' decisions on the standing of indirect purchasers to sue will be helpful in Canada for the question is certain to arise in litigation brought under section 31.1 of the Combines Investigation Act. A price-fixing conspiracy that restrains competition unduly is an offence against section 32(1), and the parties to the conspiracy will be liable in damages if it can be shown that without the conspiracy the product or service would have been supplied at a lower price than the price actually paid.

The question of standing to sue for price-fixing overcharges has significant implications for the class action enforcement of the damages remedy to be created by Bill C-2. Indeed, the utility of the class action in this connection cannot properly be judged until the standing issue is resolved. A class action brings together numerous individual claims that otherwise would have to be tried separately, and the larger the number of claims the greater the justification for bringing a class action in the particular case. Since the chain of distribution for any commodity will invariably involve fewer

middlemen, immediate purchasers from the manufacturer or supplier, than ultimate consumers, a stronger case can be made for allowing the class action enforcement of the damages remedy if indirect purchasers can recover than if recovery is restricted just to immediate purchasers.

Causation and Reliance

Causation is an element of the civil damages remedy created by section 31.1 whatever the Part V offence relied on by the plaintiff. It is not enough to prove that the defendant committed the offence; the plaintiff must show that he was injured as a result. Causation is a general requirement, but what constitutes the necessary connection between offence and injury in any case will depend on the particular offence alleged.

Compare, for instance, the offence of collusive price fixing prohibited by section 32 with the section 36 misleading advertising offence. The causation issue will reflect the different ingredients of the two offences. In both, the civil action plaintiff has to prove the Act violation, his purchase of the product in question and the amount of his damage. But with misleading advertising there is an additional element. The plaintiff must also show that he relied on the advertisement before buying. The offence of misleading advertising is committed whether any person was actually misled or not, but in a civil action, proof of reliance by the plaintiff is essential because section 31.1 only allows damages to be recovered for loss that is "a result of" the violation. The person who buys a product which the defendant has falsely advertised in breach of the statute is not injured as a result of the offence unless he bought in reliance on the advertisement.

In an action by a single purchaser for his own damages reliance is established quite simply by the plaintiff testifying that he bought in response to what was falsely advertised. Reliance, however, could be a complicating factor in a class action brought on behalf of numerous purchasers, if every member of the class had to separately establish this element of his claim. The necessity for separate proof might impair the utility of the procedure in some situations, for example, if the loss is quite small and the cost of proof bears no reasonable relation to the amount.

Damages is another matter that can present a problem in a class action if the loss for each class member is not the same and the amount cannot be calculated without individual proof.

The question of separate proof by the individuals on whose behalf a class action is brought will be examined in Chapter X. The chapter analyzes the different offences created by Part V for the purpose of identifying the causes of action for damages that include the element of reliance. Misleading advertising has been mentioned already, but proof of reliance might be necessary in claims based on other Part V practices such as bait and switch selling and sales above advertised price. Chapter X also examines the situations in which damages might have to be separately quantified.

II: FOOTNOTES

1. Third Session, Twenty-Eighth Parliament, 19-20 Elizabeth II, 1970-71.

2. Ibid, s. 80(1).

3. Ibid, s. 55.

4. 38 Stat. 731, 15 U.S.C. s. 15.

5. Bill C-2, s. 31.1(2).

6. Among them are Trade Marks Act, R.S.C. 1970, c. T-10, s. 53; Trade Practices Act, S.B.C. 1974, c. 96, s. 20 (consumer damages for deceptive or unconscionable act or practice); Business Practices Act, S.O. 1974, c. 131, s. 4(1) (rescission of consumer contract for unfair practice).

7. Timberlake, Federal Treble Damage Antitrust Actions, 14 (1965).

8. In practice, however, sub-section (2) may not be as useful as first appears. Evidence of conviction for a Part V offence is proof in the civil action that the defendant committed the offence "in the absence of any evidence to the contrary". This suggests that the presumption of commission of the offence from the fact of conviction disappears once any evidence is given that the defendant did not commit the offence. The sub-section would help the plaintiff more if it provided that the presumption was to prevail "unless the contrary is proved". See Civil Evidence Act 1968, s. 11 (U.K.); Stupple v. Royal Insurance Co., (1971) 1 Q.B. 50 (C.A.); Zuckerman, Previous Conviction as Evidence of Guilt, 87 L.Q.R. 21 (1971).

9. Conference of Studio Unions v. Loew's, Inc., 193 F. 2d 51, 54-55 (1951).

10. 392 U.S. 481 (1967).

11. In re Western Liquid Asphalt Cases, 487 F. 2d 191 (9th Cir. 1973). See also, McGuire, "The Passing-On Defence and the Right of Remote Purchasers to Recover Treble Damages Under Hanover Shoe", 33 University of Pittsburgh Law Review 177 (1971); Comment, "Antitrust - Multiple Treble Recovery in Private Antitrust Litigation", 28 Rutgers Law Review 148 (1974); Rodos & McMahon, "Standing to Sue of Subsequent Purchasers For Antitrust Violations - The Pass-On Issue Reevaluated", 20 South Dakota Law Review 107 (1975); 719 A T R R A-8 (June 24, 1974); Note, "Standing to Sue in Antitrust Cases: The Offensive Use of Passing-On", 123 University of Pennsylvania Law Review 976 (1975).

III. THE CLASS ACTION - DESCRIPTION AND HISTORY

General Description

A class action brings together for a single determination the claims of a number of persons against the same defendant that essentially raise an identical question.[1] What justifies a class action is the interest of all in having the same question determined against the defendant. What secures this result is the binding quality of the class action judgment. Whatever the outcome, judgment in a class action on the common question binds not only the immediate parties, the plaintiff and the defendant, but also those whom the plaintiff represents, the members of the class.[2] The class action is therefore a convenient substitute for numerous separate actions brought against the defendant by individual members of the class, each action raising the same question. The procedure saves time for the courts and spares the parties the trouble and expense of repeated litigation on an identical issue.[3] Also, since judgment in an ordinary action binds only the actual parties, there is always a possibility that if the same question is raised again in separate proceedings between different parties another court will reach the opposite conclusion. The class action, however, is an exception to the general rule as to the binding effect of a judgment.[4] Judgment in a class action binds the class members as fully and effectively as if they had brought actions themselves, and thus avoids the risk that different courts will make inconsistent findings.

A recent case in British Columbia, Chastain v. British Columbia Hydro and Power Authority,[5] demonstrates the utility of the class action in achieving the adjudication of a large number of claims in a single proceeding. The case raised the question of the validity of a billing procedure

adopted by the defendant Authority. For some years the Authority had followed the practice of requiring persons who wanted gas or electric power to pay a security deposit. The practice, however, was discriminatory for the Authority only demanded the deposit from individuals who were considered poor credit risks. The defendant claimed that it was authorized to demand the deposits under regulations purportedly made pursuant to the British Columbia Hydro and Power Authority Act, 1964. The regulations allowed the Authority to obtain security deposits and to fix the amount.

The plaintiffs in the action were customers of the Authority who had either paid or who had been called on by the defendant to pay security deposits. They sued for themselves and on behalf of all other customers of the defendant in the same situation and claimed a declaration that the defendant had no valid authority to require security deposits, an order, in effect, for the return of the moneys deposited, and an injunction against the defendant demanding security deposits in the future.

Over the objection of the defendants, the court upheld the validity of the representive proceedings, concluding that plaintiffs and class members "form(ed) a group having the same interest in the cause." The question common to all the claims was the validity of the regulation under which the defendant purported to act. At trial, the court found for the plaintiffs on the question and, accordingly, made orders in the terms of the relief claimed in the statement of claim.

History of Procedure

Class action procedure in the common law provinces of Canada today is regulated by a Rule of Court that is substantially identical in each jurisdiction.

For instance, the rule in Ontario, Rule 75 of the Rules of Practice, provides:

> Where there are numerous persons having the same interest, one or more may sue or be sued or may be authorized by the court to defend on behalf of, or for the benefit of, all.[6]

The Rule first appeared in England as part of the procedural reforms that accompanied the introduction of the Judicature Act system in that country 100 years ago. The new system and the substance of the procedural reforms, including a similar class action rule, were adopted soon afterwards in Canada. The rule, however, did not establish the class action procedure. The procedure, known originally as the representative suit or action, had long existed in England where its origin can be traced to the Court of Chancery towards the end of the seventeenth century.[7]

The class action developed as an offshoot of the rule in equity as to the necessary parties to proceedings before the Chancellor. The general rule was that all persons materially interested in the subject of the suit, either as prospective plaintiffs or prospective defendants, ought to be made parties, however numerous they might be, in order that a final end might be made of the controversy and a multiplicity of proceedings avoided.[8] Convenience was the consideration on which the rule was founded. The same consideration of convenience led to the rule being relaxed when to insist that all persons interested be made parties would be impracticable or would produce hardship. It was recognized that joinder might be difficult or impossible if the interested persons were very numerous or were out of the jurisdiction or otherwise could not be located. To prevent the suit being defeated by the failure of the plaintiff to join all interested persons as parties, equity would sometimes dispense with complete joinder if the actual parties had a common

interest with the absent individuals in the outcome of the suit and fairly represented them in the conduct at the proceedings.

Hence the evolution of the representative or class suit. Its essential characteristic was that the decree of the court bound the representative party and all those persons who, though not parties themselves, had the same interest in the outcome as the representative. The class suit device therefore ensured that the court would not decline jurisdiction for want of joinder of all interested persons, but would proceed to adjudicate on the controversy. At the same time the device implemented the policy that there should be but a single adjudication that put an entire end to the dispute and bound all those who had an interest in the result.

The need to avoid the injustice caused by a strict application of the compulsory joinder rule ceased to be a justification for the class suit with procedural changes that took place in England and in this country upon the introduction of the Judicature Act system and the accompanying rules of practice. The most significant change as regards the class suit was the virtual abolition of the compulsory joinder rule itself. The new rules gave the plaintiff a much greater discretion in selecting the persons to be joined as plaintiffs or defendants than had existed previously. The rules also provided that an action would not be defeated by reason of the misjoinder or non-joinder of parties and that the court could in every case deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

Prejudice Caused By Judgment

Judgment in a class action binds the members of the class as well as the actual parties to the litigation, the representative plaintiff and the

defendant. Moreover, the class members are bound whatever the outcome of the proceedings. If the action is successful, class members can come forward and take advantage of the judgment pronounced for the plaintiff. If it fails, the judgment for the defendant will prevent class members from raising their claims again in another action. There is therefore a real risk that a class action could prejudice a class member who had intended to sue himself. However, the nature of the risk cannot be appreciated properly unless two particular features of the class action procedure are understood. These concern the mode of appointment of the class representative and notification to the class of the commencement of the action.

Appointment of Class Representative. A class action plaintiff is entirely self-appointed.[9] Any person who belongs to a prospective class may bring a class action simply by stating in the writ of summons, the court document by which an action is commenced, that he sues both personally and also on behalf of all other individuals who are in the same situation as regards the defendant. The issue of the writ signals the commencement of the class action and from that moment all the persons whom the plaintiff claims to represent comprise the class. There is no requirement that the plaintiff should first obtain the authority of any class member to bring the action, and the court will not consider the question. Nor will the court inquire into the ability of the representative plaintiff to adequately present the case for the class, at least not on its own initiative. If the original plaintiff or his lawyer proves inept in the prosecution of the action, the defendant will scarcely object to their performance as the rule that a class action judgment binds class members is not qualified by any requirement that the class claims should have been presented with reasonable competence. It seems, however, that on objection made by a class member the court might intervene and substitute another person as plaintiff if it is shown that the original party cannot properly

present the case or that he is acting contrary to the interests of the class, for example, by proposing to terminate the action.[10] Also, though there is really no precedent for the step in the common law jurisdictions outside the United States that have a class action procedure, it is submitted that Canadian courts would probably allow a person on whose behalf a class action was brought to be excluded from the class. After exclusion the member would be free to bring his own action and would not be bound by judgment in the class action. In the United States, the class action rule in Federal courts gives class members an option to exclude themselves in this way.

Notice to Class. Though a class member may have the right to apply to the court for the appointment of a more effective representative or to be excluded from the class, the right is hardly very useful if class members have no notice of the action. In Canada, as in other common law jurisdictions outside the United States, the plaintiff is not required to give any notice of the action to the class, either when the action is commenced or at any subsequent time prior to judgment, nor will the court itself notify the class of the proceeding. It is therefore possible for a class action to be brought and taken to judgment with only a few or perhaps none of the class members knowing of the proceeding. Yet the judgment will bind the class irrespective of the result and whether the members have had notice of the action or not.

In just one situation under present Canadian practice are class action members guaranteed notice, though not until after judgment. If judgment is given for a class in an action for the payment of money where the entitlement of each class member requires separate calculation, class members will ordinarily need to be notified of the judgment to allow them to come forward and establish their rights to participate in the recovery.[11] Then, the court will direct that notice be given to class members inviting them to prove their claims. If not all class members are identifiable, the court may also order that attempts be made to locate them, for instance, by directing inquiries or requiring a notice to be published in the media.

III: FOOTNOTES

1. Canadian writing on class actions is not extensive. For a general account of the subject, see Sherbaniuk, "Actions By and Against Trade Unions in Contract and Tort", 12 University of Toronto Law Journal 151 (1958); Kazanjian, "Class Actions in Canada", 11 Osgoode Hall Law Journal 397 (1973). The following articles deal with consumer class actions: Trebilcock, "Private Law Remedies for Misleading Advertising", 22 University of Toronto Law Journal 1 (1972); McFadyen, "Consumer Class Actions", 4 Queen's Law Journal 50 (1973); Ziegel, "The Future of Canadian Consumer Class Actions", 32 The Advocate 286 (1974); Williams, "Consumer Class Actions in Canada - Some Proposals for Reform", 13 Osgoode Hall Law Journal 1 (1974).

   The volume of writing on the subject in the United States is enormous and the following is a very small selection of materials: On class actions under the Federal Rules of Court Procedure, see Wright, "Class Actions", 47 F.R.D. 169 (1970); Simon, "Class Actions - Useful Tool or Engine of Destruction", 55 F.R.D. 375 (1972); Dole, "The Settlement of Class Actions for Damages", 71 Columbia Law Review 971 (1971). On class actions in the consumer sphere, see Dole, "Consumer Class Actions Under Recent Consumer Credit Legislation", 44 New York University Law Review 80 (1969); Eckhardt, "Consumer Class Actions", 45 Notre Dame Lawyer 663 (1970); Travers & Landers, "The Consumer Class Action", 18 University of Kansas Law Review 811 (1970); Comment, "Class Action for Consumer Protection", 7 Harvard Civil Rights - Civil Liberties Law Review 601 (1972); Report of the National Institute for Consumer Justice, "Redress of Consumer Grievances", 27-38 (1973); Committee on Commerce, United States Senate, "Class Action Study", 30 (1974); Homburger, "Private Suits in the Public Interest in the United States of America", 23 Buffalo Law Review 343 (1974).

2. Brown v. Vermuden, (1675), 1 Chan. Cas. 272; 22 E.R. 796; Meux v. Maltby (1818), 2 Swans 277 at 285; 36 E.R. 621; Commissioner of Sewers v. Gellatly (1876), 3 Ch. D. 610 at 616; In re Calgary and Medicine Hat Land Co., (1908) 2 Ch. 652 at 695; Markt & Co. v. Knight Steamship Co., (1910) 2 K.B. 1021 at 1040; May v. Wheaton (1917), 41 O.L.R. 369 at 371; Hansberry v. Lee, 311 U.S. 32 (1940).

3. "Manifestly, the purpose of the rule is not only to avoid multiplicity of actions and to allow the orderly disposition of litigation in a convenient manner but also to provide an inexpensive means of preventing the frustration of justice by costly and piecemeal litigation", Shaw v. Real Estate Board of Greater Vancouver (1973), 36 D.L.R. (3d) 250 at 260, per Nemetz, J.A. (B.C.C.A.). See also, Duke of Bedford v. Ellis, (1901) A.C. 1 at 14, per Lord Shand.

4. May v. Newton (1887), 34 Ch. D. 347; Templeton v. Leviathan Pty.Ltd. (1921), 30 C.L.R. 34; Hansberry v. Lee, 311 U.S. 32 (1940).

5. (1973), 32 D.L.R. (3d) 443.

6. The class action provisions in the other common law provinces are: Alberta: Alberta Rules of Court, 1969, r. 42; British Columbia: Supreme Court Rules, 1961, O. 16, r.9 (M.R. 131); Manitoba: The Queen's Bench Rules, r. 58; New Brunswick: Rules of Court, 1969, O. 16, r. 9; Newfoundland: Rules of the Supreme Court of Newfoundland, O. 16, r. 9: Nova Scotia: Rules of the Supreme Court of Nova Scotia, 1971, r. 5:09; Prince Edward Island: Supreme Court Rules of Prince Edward Island 1954, O. 15, r. 9; Saskatchewan: Rules of Court of the Province of Saskatchewan, 1961, r. 45.

Quebec is the only province that does not have a similar class action provision. Article 59 of the Code of Civil Procedure requires any person suing on behalf of others to file with the court a power of attorney from those whom he represents. This effectively precludes a class action.

As to the Federal Court of Canada, see Federal Court Rules, r. 1711. The class action rule in England was replaced in 1965 with a more detailed provision (O. 15, r. 12). However, as regards the circumstances for bringing a class action the new rule retained without any elaboration the "same interest" formula contained in the original.

7. See the cases mentioned in note 2, supra.

8. Cockburn v. Thompson (1809), 16 Ves. Jun. 321, 33 E.R. 1005; Smith v. Swormstedt (1853), 57 U.S. (16 How.) 288 at 302-303; Duke of Bedford v. Ellis, (1901) A.C. 1 at 8-11; Chafee, "Some Problems of Equity," 200-213 (1950); Kazanjian, op.cit., note 1, 396 at 399.

9. Markt & Co. v. Knight Steamship Co., (1910) 2 K.B. 1021 at 1039; Sykes v. One Big Union (1936), 43 Man. R. 542; Sykes v. McCallum (1940) 4 D.L.R. 413 at 415.

10. McPherson v. Gedge (1883), 4 O.R. 246 at 262; Re Ritz and New Hamburg (1902) 4 O.L.R. 639; Moon v. Atherton, (1972) 3 All E.R. 145.

11. See, for instance, Shabinsky v. Horwitz (1973), 32 D.L.R. (3d) 318.

IV. THE MODERN CLASS ACTION

Contemporary Rationale

After the abolition of the compulsory joinder rules and until fairly recent times, the justification for the class action was that by allowing the plaintiff to sue on behalf of all who had the same interest in the dispute a multiplicity of proceedings raising the same question might be avoided. The assumption was that the interest of the individuals involved in the controversy was sufficiently substantial that it was likely they would bring separate actions to recover relief. By contrast, one rationale of the class action that is advanced today is not that the procedure saves defendants from the inconvenience of numerous actions, but rather that without a class action there are situations where no individual will recover at all.

This perspective of the class action reflects a concern that individuals in society who do not command economic power and wealth need measures to protect themselves against exploitation by those who do.[1] The class action is an instrument by which the economically disadvantaged, consumers, tenants, small businessmen and others, can secure collective redress in the courts for injury, actual or threatened, inflicted by government or industry. At times the stake of just one individual is not sufficiently substantial to warrant a separate action. It is not worth the trouble to sue, particularly if proof is difficult for then the plaintiff will run the risk of liability for costs should the action fail. There is greater justification for litigating, however, when many individual claimants are in virtually an identical position and the adjudication of one claim will decide the claims of all. What would perhaps be impracticable and unrealistic for an individual to prove just for himself becomes worthwhile if compensation can be obtained for hundreds and possibly thousands of people. A favourable judgment in a

class action has this result. If the question common to all the claims is difficult to prove, the collection of claims under the class action umbrella may not make the task any easier, but the prospect of recovery for numerous persons at least makes the action defensible economically.

Class Action in Action

Some hypothetical examples will demonstrate the utility of the class action device in a consumer context. Suppose a store advertises a new brand of electrical appliance, a room humidifier for instance, and sells them at $120.00 each to several hundred people. Due to a defect in design the product proves to be useless after a few hours' operation and cannot be repaired. The sale being subject to the statutory warranties of fitness and merchantable quality, each purchaser would be entitled to damages, the measure, for convenience, being the purchase price of $120.00. Assuming the retailer was not prepared to make a refund, each purchaser could bring a separate action for damages, and each action would raise the same question of faulty design. But a finding of fault by one court would not bind the courts in the other actions and, in theory at least, different courts could reach opposite conclusions. A class action would eliminate this uncertainty and also save the court system from repeated litigation on the identical question. A few purchasers, even just one, could sue the retailer for damages, bringing the action for themselves and on behalf of other purchasers as well. This would unite the separate claims of each purchaser against the defendant and a favourable finding by the court on the common question of defective design would benefit both plaintiff and class members. The court would then assess the damages for the class and order the defendant to pay the amount. Each member would simply prove his purchase of the appliance and he would be repaid the price.

The situation in the next example is slightly more complicated. Suppose a new car dealer sells cars equipped with a faulty steering system to a large number of people, the statutory warranties of fitness and merchantable quality being a term of the sale. Defective design would again be the common question in a class action for damages brought against the dealer, though proof would probably be rather more difficult than for the allegation in the humidifier situation. The real distinction between the two cases would lie in the assessment of damages for individual class members. For most car purchasers the damages would be uniform. Presumably, the steering defect could be corrected and so the cars would not be valueless. The measure of damage would be the difference in value between a car with a sound steering system and the car actually sold. However, some members might have suffered additional damage consequent upon the steering fault, for instance, property damage or even personal injury. Separate inquiries would then have to be held to quantify the particular loss of these class members. Each assessment could develop as a trial within the principal action itself.

Also, a class action for damages for misrepresentation or breach of an express warranty, where the misrepresentation or warranty was made in identical terms to members of the class, might necessitate separate inquiries to establish the right of individuals to recover. In an ordinary action for damages for misrepresentation or breach of warranty the plaintiff has to show that he relied on the representation or warranty to his detriment. In a class action, the question of reliance could be quite time consuming if each class member had to prove the matter separately. However, individual proof might be dispensed with once the plaintiff had established the necessary facts as a foundation, if the court would draw the inference that the representation or warranty was made to each class member and that each member relied on it. The Supreme Court of California was prepared to take this approach in a

class action for fraudulent misrepresentation brought by purchasers of home freezers.[2] The court held that direct evidence of reliance is not always necessary, and that sometimes it can be presumed from the fact that a material representation was made to class members concerning the product in question and that action was subsequently taken by the members, for instance, by purchasing the product. Thus, for example, applying this principle, if a mail order business, after sending circulars to its customers concerning a particular product, had received orders for the product, the court could presume that customers had read the circular. The court might also be prepared to conclude that if the circular contained a representation as to the product, the customers relied on it in placing orders. This approach does not eliminate reliance as an element of the cause of action for damages for misrepresentation or breach of warranty; it is a method of facilitating proof of that fact.

Class Action for Price Discrimination

The preceding examples suggest how the class action could be employed in the setting of the Combines Investigation Act.

Suppose that contrary to section 34(1)(a) of the Act, the price discrimination provision, a soft drinks manufacturer sells its product to a supermarket chain at a discount which it will not allow variety store operators. Using the discount, the chain is able to drop substantially the retail price of soft drinks, and variety stores in the vicinity of the supermarket are adversely affected. The enactment of Bill C-2 will give a damages remedy to any operator who can show loss as a result of the commission of the price discrimination offence. In a class action for damages brought against the manufacturer on behalf of all operators injured by the discount advantage the common question will be whether the defendant did discriminate in price as alleged. If the class succeeds on this question, individual operators will be able to recover damages provided they can show a reduction in profit as a result of the price discrimination. Causation

and quantification of damage are not common questions and separate enquiries would have to be made for each claimant. Proof of causation and damage might be difficult in some cases, but the class action judgment will spare the claimants the necessity of having to separately establish the price discrimination violation.

Mix of Common and Separate Questions

A class action will sometimes raise both common questions and questions that affect individual class members only and call for separate proof. A complete identity of interest on every issue represents the paradigm situation for a class action and, in theory at least, the justification for the procedure will weaken as the number of individual questions increases. The balance between common and individual questions will vary from one class action to another to the point where the questions common to the class are so subordinate to the separate questions affecting individuals only that a class action ceases to be a viable alternative to independent proceedings. However, whatever the theoretical objection to class actions that necessitate separate inquiries on questions that affect just individual members, possibly quite extensive, the practical justification for the procedure is that it can secure redress for the grievances of many people where otherwise no more than a few, perhaps none at all, would have gained relief.

Prospects in Canada

Assuming that Bill C-2 with its damages remedy for a Part V violation is enacted, what are the prospects for bringing a class action to enforce the remedy in the Federal Court or the courts of the provinces. The answer is that they are not good. It is almost certain that the court will strike out the plaintiff's assertion of a representative capacity. This will not prevent the plaintiff from carrying on with the action to obtain relief for himself, but it will end the claim brought for the class. That the claim arises under the Combines Investigation Act will not be the reason for the

court's rejection of the class claim. It is the fact that the individual claims arise out of contracts made or relationships existing separately between class members and another person, usually the defendant, and also that the relief claimed is damages, particularly if the damages need separate calculation for each class member. For these reasons the courts are likely to hold that the representative plaintiff and class members do not have a sufficient common interest to justify a class action. Another ground for the denial of class action relief, subsidiary perhaps to the lack of common interest objection concerns a particular deficiency in the existing class action procedure which will be regarded as placing the defendant at a procedural disadvantage in relation to members of the class. Since the class members are not strictly parties to the litigation they cannot be ordered to pay costs to the defendant should they fail to establish their claim to participate in the recovery once the defendant has been adjudged liable on the common question. Nor can the defendant obtain the production of documents from class members or orally examine them for discovery. Production of documents and oral examination are discovery devices that are automatically available to the parties in ordinary litigation, and they could be useful to a class action defendant when contesting the claims of individual class members.

On these various grounds Canadian courts have refused consistently to entertain damages class actions for breach of a term common to contracts made separately between each class member and the defendant, the damages requiring individual assessment.[3] The refusal reflects a rather narrow interpretation of the common interest element of the Rule of Court that governs class actions in courts at all levels. This report concludes that the courts would take the same restricted view of the Rule if class actions were brought for the damages remedy created by the combines legislation, certainly if the damages to each class member had to be separately calculated.

The Chastain decision in British Columbia probably represents the highwater mark of judicial recognition in this country of the class action.[4] In Chastain, the conduct of the defendant public authority was impeached on the ground that the regulation under which it claimed to demand security deposits was invalid. This was the common question and there were really no other questions to decide. All the class members derived their right to sue from the same source, an Act of the legislature of universal application, and once the court declared that the regulation purportedly made under the statute was ultra vires, the defendant could no longer validly retain deposits or require fresh deposits to be paid. All that remained for the court was to direct the authority to refund deposits to the consumers listed in its books.[5] Individual proof by consumer members of the class was therefore unnecessary.

Whatever the ground for not allowing damages class actions, the outlook for any relaxation in the judicial attitude in Canada is not promising. Recently, for example, the British Columbia Court of Appeal took the opportunity, though strictly it was not necessary for its decision to do so, to state that the existence of separate contracts was a bar to a class action, and that the procedure could not be used to recover "personal damages". The Ontario Court of Appeal has also reiterated the individual damages proscription.[6]

In the foreseeable future there is really no reason to anticipate any reversal of the judicial rejection of damages class actions. Legislation will therefore be necessary if damages claims under the Combines Investigation Act are to be advanced on a collective basis. This report concludes that damages claimants ought to be allowed to sue as a class in appropriate cases and it therefore sets out specific legislative proposals. (They are contained in the Appendix). The provisions are designed to ensure that the courts do not confine the procedure within the same narrow limits fixed

in the past. They stipulate that class action relief is not to be denied on the ground only that the claims of class members against the defendant arise out of contracts or relationships that for each member were made or exist separately or that members claim damages that require individual calculation. The legislation also meets the objection that under present practice the class action defendant, after being found liable to the class on the common question, cannot obtain discovery from individual members nor recover costs against them if they fail to establish their right to participate in the recovery. The proposed legislation will give the defendant these procedural rights.

United States Developments

Courts in the United States have taken a much broader view of the common interest element of the class action concept than Canadian courts. This development is relatively recent and has followed the introduction in 1966 of a new procedural rule for the class action in Federal courts. The Rule, Federal Rule of Civil Procedure 23,[7] allows a class action to be brought when questions common to the class sufficiently predominate over questions that affect individuals only. Several states have introduced a class action procedure modelled on the federal rule and have adopted this common interest-predominance test. In applying the test, American courts have taken a pragmatic approach to the role of the class action. Though individual proof might be necessary one or even a number of the issues on which liability to individual class members depends, the courts have not denied class action status if the advantage that members will gain in securing a finding on the common questions outweighs any administrative problems the separate issues present.[8] The new procedure has brought class relief for the first time into areas affecting consumers generally, for example, violations of the antitrust laws and legislation for truth-in-lending, rate overcharging by public utilities, fraudulent sales to consumers, and sales following misleading advertising and other deceptive trade practices.

IV: FOOTNOTES

1. "The class action is one of the few legal remedies the small claimant has against those who command the status quo. It would strengthen his hand with the view of creating a system of law that dispenses justice to the lowly as well as to those liberally endowed with power and wealth." (Eisen v. Carlisle & Jacquelin, 94 S.Ct. 2140 (1974), per Douglas J.).

2. Vasquez v. Superior Court of San Joaquin County (1971), 94 Cal. Rptr. 796. For comment on Vasquez, see Mainland, "Class Actions in California: A First Look at Vasquez v. Superior Court", 47 Los Angeles Bar Bulletin 13 (1971); Comment, 18 UCLA Law Review 1041 (1971).

3. See Johnston v. Consumers' Gas Co. (1898), 23 O.A.R. 566; Markt & Co. Ltd. v. Knight Steamship Co. Ltd., (1910) 2 K.B. 1021; Preston v. Dilton (1920), 48 O.L.R. 172; A.E. Osler & Co. v. Solman, (1926) 4 D.L.R. 345; Shaw v. Real Estate Board of Greater Vancouver (1973), 36 D.L.R. (3d) 250 at 254, 255 (B.C.C.A.); Farnham v. Fingold, (1973) 2 O.R. 132 at 136 (C.A.).

4. Chastain v. British Columbia Hydro and Power Authority (1973), 32 D.L.R. (3d) 443.

5. The formal court order enjoined the Authority "from demanding, or collecting, or keeping security deposits as a condition precedent to the supply of gas or electrical power to residential consumers."

6. Shaw v. Real Estate Board of Greater Vancouver, Farnham v. Fingold. Op.cit., note 3.

7. The Rule is reproduced in Appendix C to the Paper by Jennifer Whybrow, The Case For Class Actions in Canadian Competition Policy: An Economist's Viewpoint.

8. See Green v. Wolf Corporation 406, F. 2d 291 at 300 (1968); Dolgow v. Anderson, 43 F.R.D. 472 at 488 (1968); Berland v. Mack, 48 F.R.D. 121 at 128 (1969); Vasquez v. Superior Court of San Joaquin County, 94 Cal. Rptr. 724 (1967).

V. DAMAGES AWARD AND ENFORCEMENT OF COMPETITION POLICY

Function of Award

The enactment of Bill C-2 will establish for the first time a statutory damages remedy for persons injured as a result of an anti-competition offence.[1] The remedy has a further significance as potentially it is an auxiliary means of enforcing the combines legislation itself. In Canada so far this activity has been the responsibility of government almost entirely,[2] with the government investigating violations and prosecuting offenders in criminal proceedings. Now the private civil damages plaintiff will participate in the enforcement activity since a damages award for a substantial amount will have the same deterrent value as a criminal find. A civil action that results in a damages liability sufficient to deter offenders can thus substitute for a criminal prosecution as a measure for securing the observance of the competition laws.

A defendant found guilty of an offence against Part V of the Combines Investigation Act is liable to a fine or to a term of imprisonment or to both a fine and imprisonment. The practice of the court, however, is to fine and few prison sentences have been imposed.[3] The Act sets no maximum fines for Part V offences which are indictable and Bill C-2 will raise the maximum penalty for summary offences to $25,000.

The objects of a criminal fine, whether imposed for an offence against Part V of the Act or for any other type of offence, are to punish[4] and to deter, though for combines offences the courts have emphasized more the factor of deterrence.[5] However, the monopolistic behaviour and other anti-competition practices that are prohibited by Part V are activities of business, and business will scarcely be deterred by fines that leave the profit yielded by the violation substantially intact. It is essential, therefore, that when assessing a monetary penalty, the court consider what profits

the defendant gained from its offence since a fine that is too small will be treated simply as a necessary cost of business by the trader who is prepared to engage in anti-competitive behaviour and run the risk of detection and prosecution.

A number of courts on sentencing for a Part V violation have in fact recognized the need to relate the fine to the offender's profits,[6] but the ability of the court to actually do this depends on whether there is any evidence of the profit amount. The evidence will not always be available. Since the gain to the defendant is not usually relevant on the question whether a combines offence was committed, the prosecution might not seek to obtain the information if it has no value other than to assist the court when sentencing after conviction, especially when it cannot readily be obtained. Also, not every court has taken the view that profits ought to be considered in assessing penalty. The result is that in some cases the fines imposed for anti-competitive behaviour have been far from sufficient as a deterrent for the future.[7]

With the creation of a damages remedy for loss inflicted by anti-competitive behaviour, the liability to pay damages becomes a factor in assessing the deterrent value of a criminal fine,[8] particularly if all the individuals sue as a class and thus have their individual damages assessed at the one time. A damages award can now compensate for a fine that is inadequate as a deterrent. Conversely, the combination of award and fine could result in over-deterrence if the criminal court fixes a substantial penalty that reflects the defendant's profit from its unlawful activities.

Under a system that will allow the private litigant to pursue a damages claim independently of criminal proceedings it is not possible to guard against excessive deterrence entirely. The danger, however, could be exaggerated because it is reasonably certain that in practice sentencing courts will take the damages liability of the defendant into account in determining the fine, especially if the defendant has already been made liable in a civil action to pay damages, either by judgment or compromise. Even where the defendant is under no damages liability at the time of sentencing, the court can consider the possibility of future liability, and probably will do so if an action has actually been commenced or is threatened.

Of course, an evaluation of the deterrent impact of a damages award and criminal penalty for the same competition offence supposes that a criminal prosecution will actually be brought. Indeed, there might be less justification for the civil damages remedy if it were certain that the criminal process would reach every offender, especially if on conviction the courts fixed a fine high enough to deter. The victims of the offence would not be compensated, but deterrence might be viewed as the overriding objective particularly when individual losses were small. Such a fine, incidentally, would divest the defendant of the profits from its unlawful activity and thus prevent its unjust enrichment.

Public Enforcement Prospects

It cannot be assumed that whenever a combines offence is committed a criminal prosecution will follow automatically. Price-fixing, monopolization, price discrimination, price maintenance, misleading advertising and the other practices prohibited by Part V are hardly traditional crimes. The activities are usually not so visible nor do they affect the safety and well-being of citizens so directly as the offences of the criminal code. Competition policy is not a topic that has excited much debate in the

electorate and so public pressure on the legislature to make competition more effective has not been strong. Indeed, the attitude of government itself to the legislation has vacillated somewhat over the years and successive ministries have pursued the competition goal with varying degrees of enthusiasm.[9] Whatever the reason, competition enforcement has not been a very high priority of government and the departments responsible for securing compliance with the legislation have not been equipped sufficiently for the vigorous effort required in pursuing this objective. Detecting offenders is the key to successful enforcement, but with only limited resources, this activity has to be curtailed, and the prosecution that does occur is usually for flagrant violations, often coming to notice through public complaint. A policy statement of the government on inflation tabled in the House of Commons on October 14th, 1975, mentioned "a more selective and vigorous enforcement policy" for the combines legislation. The statement gave no details of what was meant by this rather vague reference and it has not been elaborated since. There has certainly been no commitment by the government that enforcement resources are to be enlarged to allow a significant expansion of enforcement activities.

Private Antitrust in the United States

In the United States the enforcement of competition policy by government agencies[10] has similarly been restricted by an inadequate appropriation of resources.[11] One result has been that the private treble damages suit has assumed a significant role in the effort to achieve compliance with the antitrust laws. Indeed where a violation is suitable for civil action, the policy of the Justice Department is to consider the prospect of private enforcement in deciding whether to take proceedings itself, and it might refrain from doing so if the persons injured have sufficient resources to bring their own action.[12]

The Supreme Court has recognized the importance of the private suit, referring to it as a "bulwark of antitrust enforcement" which "further(s) the overriding public policy in favour of competition."[13] The Court has also spoken of the role that Congress has envisaged for the action: "Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws."[14] Lawyers, both in government[15] and private practice,[16] academic writers[17] and economists[18] all have testified to the part played by the private suit in the total enforcement picture. But the faith of the courts and lawyers who espouse the treble damages action has not gone unchallenged. There are critics who maintain that the claims advanced for the proceeding lack empirical support, and that no study has yet verified the deterrent and compensatory effects attributed to the action or compared its effectiveness to that of other possible means of enforcing the antitrust laws.[19]

In the early years of antitrust few private actions were brought and the great majority failed.[20] More recently, however, the success rate has improved somewhat and the volume of litigation expanded considerably as the courts have become more receptive to the claims of the individual enforcer and procedural developments such as more extensive pre-trial discovery have removed some of the obstacles that had previously hindered the private litigant.[21] Today, criminal prosecutions and civil suits brought by the Federal government account for less than ten percent of the total number of antitrust proceedings commenced annually. The published figures disclose that the vast majority of proceedings are private civil suits brought by individuals, corporations and state governments.[22]

The published information, however, can give an exaggerated view of the contribution of the private action to antitrust enforcement. The data shows total figures only and frequently separate suits are brought for the same violation.[23] Also, the figures do not take into account the kinds of antitrust violation that are attacked by the Federal government. Numbers alone can be misleading as the government's success record has been good[24] and just one or two cases of considerable magnitude can have far-reaching consequences. The result will have a direct impact on the industry involved, and also deter large firms that have engaged in the condemned practice in other sectors of the economy.[25]

The statistics also do not indicate what number of private suits are brought in the wake of government proceedings, whether civil or criminal. Government initiatives in detecting and investigating an antitrust violation will undoubtedly assist the private litigant in developing his own claim. Furthermore, if a government proceeding is successful, the plaintiff has the benefit of section 5 of the Clayton Act, which allows him to rely on the judgment or conviction as evidence in his own action.[26] According to some commentators, about 80 percent of private suits are preceded by a judgment or conviction in proceedings brought by the government.[27] But this conclusion is only an estimate and as a description of the current situation it probably understates the proportion of private actions that are independent of prior government proceedings.[28]

Efficacy of Private Antitrust

In recent times a number of economic analysts in the United States have questioned the value of the contribution of the private action to antitrust enforcement.[29] Whether the action is brought for individual relief or on behalf of a class does not matter. The critics concede the inadequacy of government efforts to secure maximum compliance with

the antitrust laws, but assert that private litigation falls far short of compensating for the deficiency. Moreover, they argue, private actions cannot be justified economically. The cost of the antitrust suit, particularly of the class action variety, in terms of both expense to the parties and the burden on an already overcrowded court system, far exceeds the value of any damages recovery in compensating victims of an antitrust infringement as a deterrent. The opponents of the present regime would abolish the private suit altogether and abandon the compensation objective of antitrust enforcement. Ideally, all proceedings in future would be government instituted. At the very least a government suit would pre-empt any private litigation commenced previously. Deterrence not compensation would be the purpose of the government action, and on conviction for an offence the court would be expected to fix the optimum fine needed to accomplish deterrence, whatever that amount might be.

The commentators agree that in criminal prosecutions at present the courts do not set fines high enough to deter, but they differ somewhat in the details of their proposals for total or near total reliance on government efforts to suppress anti-competitive activities. Some writers have concluded that on the basis of current business attitudes toward risk "the deterrent benefits of a policy of raised fines far outweigh the deterrent benefits of expending additional enforcement resources."[30] They would keep the budget appropriation for antitrust enforcement within present limits and simply raise fines to the level necessary for deterrence. Another writer favours a combination of increased enforcement and higher fines, at the same time retaining the private damages remedy, provided action is filed before a public prosecution is commenced.[31]

This report will not examine the proposal for exclusive government enforcement of the competition laws with its emphasis on deterrence, an objective to be achieved by the imposition of optimum penalties, and for two reasons. First, the premise on which the study of the class action procedure is based is the anticipated introduction of section 31.1 of the Combines Investigation Act. The section will allow compensation to be recovered for loss caused by combines offence in proceedings brought, not by government, but by aggrieved individuals. The alternative proposal rejects this approach entirely. Secondly, to the extent that the alternative scheme calls for a heavier investment in antitrust enforcement, there is really no indication that government is prepared to make the necessary commitment.

Conclusions

United States' critics of the private damages action correctly point out that no empirical evidence exists to demonstrate the efficacy of the action in securing compensation and as a deterrent. Equally, of course, there is no evidence that the action does not perform these functions. Deterrence is a factor that is difficult, if not impossible, to measure. The compensation goal is more susceptible of evaluation, but it has to be judged not just from the success rate of plaintiffs at trial, but also from the number and the money value of actions that are settled in favour of the plaintiff before trial.

The importance of the private suit in aiding antitrust enforcement is perhaps as much an article of faith as the virtues of the competition policy which the antitrust legislation itself enshrines. They both elude precise empirical proof. Nonetheless, it is difficult to ignore the endorsement the antitrust suit has received over many years from judges, lawyers, government lawyers especially, and others associated with antitrust. Furthermore, no proof has been offered

by those who impeach the procedure to show that it does not perform the compensatory and deterrent functions that have so long been attributed to it. This report therefore adopts the traditional premise that the private damages remedy can make a useful contribution in promoting competition.

United States' experience in antitrust indicates the role that could develop for the private damages action under the combines legislation in Canada. The action secures compensation for injury resulting from anti-competitive behaviour, and its deterrent potential can also aid government efforts to enforce the legislation through the criminal law. There is certainly scope for the private litigant if government enforcement activity remains below the level needed to secure compliance.

The private action can also serve a function that has not been mentioned so far. The damages remedy enables citizens to check on the work of government and its officials. It provides a strong safeguard against a government which becomes complacent as regards the detection of competition law offences and the prosecution of violators in the courts. Government might elect not to pursue a combines offender but this will not prevent a victim of the offence from proceeding privately to expose the anti-competitive activity and recover compensation.

V: FOOTNOTES

1. In the past Canadian courts have held consistently that the Combines Investigation Act creates no civil rights enforceable by action. See, for instance, Transport Oil Ltd. v. Imperial Oil Ltd., (1935) 2 D.L.R. 500 (Ont. C.A.); Direct Lumber Co. Ltd. v. Western Plywood Co. Ltd. (1962), 35 D.L.R. (2d) 1 (S.C.). The reference to damages as the remedy for loss resulting from a competition violation would seem to preclude the court from granting the private litigant other forms of relief such as a declaration, an injunction, rescission of the transaction or contract in question, or the restitution of any money, property or other consideration given or passing to the defendant. By contrast, the trade practices legislation of other jurisdictions does authorize the courts to grant these kinds of ancillary relief in civil proceedings brought in consequence of a statutory breach. See Trade Practices Act 1974, s.87 (2) (Australia); Trade Practices Act 1974 ss. 16, 21 (British Columbia); Business Practices Act 1974, s.4(1) (Ontario).

2. The common law favours freedom to trade as a matter of public policy and courts will refuse to enforce a contract in unreasonable restraint of trade. In a sense, the defendant who sets up the defence of public policy in answer to a claim to enforce such a contract helps advance the same competition objectives that underlie the combines legislation.

3. In only three cases has an accused person been sentenced to prison (Robert Bertrand, the Director of Investigation and Research, Address to meeting of American Bar Association, Montreal, August 12, 1975).

4. Punishment may contain an element of retribution. For an examination of the sanctions of the criminal law and principles of sentencing generally, see Law Reform Commission of Canada, The Principles of Sentencing and Dispositions, Working Paper No.3; Restitution and Compensation, Working Paper No. 5.

5. For recent examples, see R v. Victoria Wood Development Corp. (1973) 9 C.P.R. (2d) 98; R. v. Browning Arms Co. of Canada Ltd., (1974) 15 C.P.R. (2d) 97; R. v. Ocean Construction Supplies Ltd., (1974) 15 C.P.R. (2d) 224; R. v. Dupli-Color Canada Ltd., (1974) 16 C.P.R. (2d) 94; R. v. F.W. Woolworth Co. Ltd. (1974) 18 C.C.C. (2d) 23; R. v. Petrofina Canada Ltd., (1975) 20 C.C.C. (2d) 315. It is said that the aspect of deterrence to the convicted defendant is not as of great importance as that of deterrence to others, because the defendant is less likely to commit the offence again, and the making of a prohibition order under section 30 of the Act against the repetition or continuation of the offence is usually made as of course (R. v. Browning Arms Co. of Canada Ltd., supra, at 103).

6. R. v. Browning Arms Co. of Canada Ltd., op.cit., note 5; R. v. A.B.C. Ready-Mix Ltd. (1975), 17 C.P.R. (2d) 91; R. v. S.S. Kresge Co. Ltd. (1975), 20 C.C.C. (2d) 7.

7. The present Director of Investigation and Research expressed this view in his address to the American Bar Association, op.cit., note 3.

8. Section 653 of the Criminal Code empowers the court that convicts an accused of an indictable offence to order the accused to pay to "a person aggrieved... an amount by way of satisfaction or compensation for loss of or damage to property." This provision might suggest that a civil damages remedy is not needed when a combines offender is convicted. However, it is not clear that the action covers the kind of loss for which damages will be recoverable under the proposed section 31.1 of the Combines Investigation Act, for instance, for excessive price charges following price maintenance or collusive price-fixing. Compare section 663(2)(e) of the

Code, which authorizes the court on the conviction of an individual to stipulate as a condition of a probation order that the accused make restitution or reparation for "actual loss or damage" caused by the commission of the offence. Assuming that section 653 of the Code does apply to a competition offence, it neverthless is of rather limited utility. First, the section relates only to indictable offences and a number of competition offences are triable summarily. Secondly, the court can only award compensation "upon the application of a person aggrieved, at the time the sentence is imposed." This qualification will restrict the distribution of compensation if individuals who were injured by the offence are not immediately identifiable and there are many of them.

9. "It is difficult to understand the development of anti-combines policy without taking account of the mixed and perhaps confused, attitudes towards competition that have prevailed in Canada" (Skeoch, Restrictive Trade Practices in Canada, 3 (1966)).

10. In the United States responsibility for enforcing antitrust is shared by two public authorities, the Antitrust Division of the Department of Justice and the Federal Trade Commission. The Justice Department alone has criminal jurisdiction, and it prosecutes for offences against the Sherman Act of 1890, which prohibits conspiracies in restraint of trade and monopolization or attempts to monopolize. Also, the Justice Department has the responsibility of instituting proceedings in equity to prevent and restrain violations of the antitrust laws (Clayton Act, s.15), and it may bring proceedings to recover actual damages for injury to the United States "in its business or property" by reason of a violation (Clayton Act, s. 4A). The Federal Trade Commission is an administrative agency which is entitled, after conducting a hearing to issue "cease and desist" orders against

infringements of the Clayton Act, which declares illegal several specific types of restrictive or monopolistic practice but does not make them criminal offences. The Commission is also responsible for securing compliance with the general ban on "unfair methods of competition... and unfair or deceptive acts or practices in commerce" in section 5 of the Federal Trade Commission Act of 1914. See generally, Neale, The Antitrust Laws of the U.S.A., 2-5, 373-5 (2d, 1970).

11. "The resources in manpower and appropriations of the Antitrust Division do not permit us to survey all aspects of the United States' economy and to develop a program of continuing surveillance of all important industries," statement by Antitrust Division Head, quoted in Neale, ibid, 375.

12. Interview with Assistant Attorney-General Kauper, 612 ATRR AA-6 (May 8, 1973).

13. Perma Life Mufflers, Inc. v. International Parts Crop., 392 U.S. 134, 139 (1967).

14. Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 318 (1964). The Court was referring to section 5(a) of the Clayton Act, a provision, like the proposed section 31(2) of the Combines Investigation Act, designed to aid the private plaintiff by making a prior antitrust judgment or conviction against the defendant evidence in the damages suit.

15. Farmer, "Panel Discussion: Private Actions - The Purposes Sought and the Results Achieved", 43 Antitrust Law Journal 81 (1973).

16. Loevinger, "Private Action - The Strongest Pillar of Antitrust", 3 Antitrust Bulletin 167 (1958),

statement to a United States Senate Select Committee on Small Business; Alioto, "The Economics of a Treble Damages Case", 32 Antitrust Law Journal 87 (1966).

17. Areeda, " The Private Action - The Corporate Manager's Heavy Artillery", 43 Antitrust Law Journal 6 (1973).

18. Max, "Tougher Antitrust Policy: Would it Curb Inflation", address to National Association of Business Economists, Washington, D.C., January 22, 1975.

19. Wheeler, "Antitrust Treble Damages Actions: Do they Work?", 61 California Law Review 1319 (1973).

20. In the 50 years since the Sherman Act of 1890, plaintiffs won 13 of the 174 cases litigated (Report of Attorney-General's National Committee to Study the Antitrust Laws, 378 (1955)).

21. "Congress itself has placed the private antitrust litigant in a most favourable position through the enactment of section 5 of the Clayton Act. In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws," Radovich v. National Football League, 352 U.S. 445, 454 (1956); Areeda, op.cit., note 17; Millstein, "Panel Discussion: Private Actions - The Purposes Sought and the Results Achieved", 43 Antitrust Law Journal 75; Note, "Private Treble Damage Antitrust Suits: Measure of Damages for Destruction of All or Part of a Business", 80 Harvard Law Review 1566, 1567. From 1952 to 1958 144 suits were litigated with recovery granted in 20 (Bicks, "The Department of Justice and Private Treble Damages Actions", 4 Antitrust Bulletin 4, 11 (1959)). An average of 200 suits were initiated each year during that period (Posner,

"A Statistical Study of Antitrust Enforcement", 13 Journal of Law & Economics 365, 371 (1970)). In 1973, 1,152 private cases were filed and in 1974, 1,230 (Max, op.cit., note 18, Table 2 citing published and unpublished figure of Director of Administrative Office of United States Courts). Plaintiffs won about 17 per cent of cases that went to trial between 1965 and 1968, but this figure understates the success rate for plaintiffs as it ignores favourable settlements. Most cases were dismissed by action of the parties and, presumably, the plaintiff would not consent to dismissal unless the defendant had offered a sum in settlement (Posner, supra, 382)).

22. 1972 Annual Report of the Director of the Administrative Office of the United States Courts, 187; Farmer, op.cit., note 15, 81; Max, op.cit., note 18, Table 2.

23. Posner, op.cit., note 21, 372.

24. Between 1910 and 1970 there was no five-year period in which the Justice Department did not prevail in at least 64 per cent of the cases initiated in the period (Posner, op.cit., note 21, 382).

25. Max, op.cit., note 18, 2; Baker, "Section 2 Enforcement - The View From the Trench", 41 Antitrust Law Journal 613-14, 617-18 (1972).

26. "The greater resources of the (Federal Trade Commission) and its staff render the private suitor a tremendous benefit aside from any value he may derive from a judgment or decree. Indeed, so useful is this service that government proceedings are recognized as a major source of evidence for private parties", (Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 319 (1964)).

27. Bicks, op.cit., note 21, 6-7; Wheeler, op.cit., note 19, 1326.

28. Wheeler, op.cit., note 19, interprets figure supplied by Posner op.cit., note 21. But the figures relate to a period which ends in 1961 to 1963. They therefore do not take into account the threefold increase between 1965 and 1975 in the number of private suits instituted annually. Also, Wheeler's conclusion is based on a single three-year period, 1961 to 1963, one that was not at all typical for in this time just one or two government indictments in what became known as the electrical equipment conspiracy spawned nearly 2,000 private suits. No other violation has ever generated such a volume of private litigation.

29. See, for instance, Posner, op.cit., note 21; Wheeler, op.cit., note 19; Breit & Elzinga, "Antitrust Penalties and Attitude Towards Risk: An Economic Analysis", 86 Harvard Law Review 693 (1973); "Antitrust Enforcement and Economic Efficiency: The Uneasy Case for Treble Damages", 17 Journal of Law & Economics 329 (1974); Dam, "Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest", 4 Journal of Legal Studies 47 (1975).

30. Breit & Elzinga, ibid, 706.

31. Dam, op.cit. note 29, 68.

VI. INCENTIVES FOR PRIVATE ENFORCEMENT

Treble Damages and Contingent Fee in the United States

In the United States treble damages recovery and the contingent fee for the plaintiff's lawyer are key features of antitrust litigation that have encouraged the bringing of private actions. In conjunction with the introduction of new court procedures for class actions, the same characteristics help explain the growth in recent times of damages class actions for antitrust violations.[1]

Courts in the United States do not ordinarily award costs against the losing party in litigation. Therefore, a lawyer who acts on a contingent fee basis for a plaintiff who is awarded damages will recover his fee out of the award. In antitrust litigation the prospect of recovering three times the damages actually sustained will add to the attraction of the fee for the lawyer, and its appeal is further enhanced if the action is brought on behalf of a class, for though fee entitlement will depend on a successful outcome, the quantum of remuneration is influenced by the judgment amount. In antitrust litigation the fee is fixed by the court and is not a pre-determined percentage of the recovery, but the court will consider the size of the recovery in assessing the fee.[2]

Treble damages also offers the plaintiff an incentive to sue where the loss suffered is reasonably substantial since compensation is ordinarily limited to the actual damage. Competition laws embody concepts of economic behaviour that are not easily translated into language of the precision of the typical criminal statute, and whether or not the defendant's conduct in a particular case violates the antitrust legislation will often depend on the judicial evaluation of complex and novel commercial arrangements. Traditionally, the outcome of antitrust

litigation has therefore been difficult to predict. Moreover, the attitude of the antitrust corporate defendant is normally far from conciliatory. The defendant is likely to have substantial interest in maintaining the scheme that is impugned and accordingly will be inclined to resist the claim with the utmost vigour usually with resources far superior to those of the plaintiff. Because of the uncertain prospects of success, the recovery of treble damages, though in a sense a windfall as to two thirds, is truly a reward to the plaintiff for assuming the risk of litigation.

In many of the class actions that are brought for antitrust violations the trebling of damages is probably not a factor that has induced the plaintiff to sue for the reason that individual claims are rather small. A small claim, whether doubled or even trebled, remains just that. In class actions of this kind the prospect of a good fee for the plaintiff's lawyer often provides the real incentive for litigation.

Costs Liability in Canada

Absent from the scheme of damages enforcement contemplated by Bill C-2 will be the two characteristics that have contributed so much to the development of the private antitrust suit in the United States, treble damages and costs arrangements of the United States' variety. Under section 31.1 the damages award will be limited to the actual loss sustained by the plaintiff in consequence of the Part V violation. Also, Canadian courts have costs rules that are different from the rules applying in the United States. Many provinces allow the lawyer for the plaintiff to provide services for a contingent fee, but every jurisdiction has a rule that costs normally follow the event, that is, that the court will order the losing party to pay the costs of his opponent. The rule applies to all litigation of whatever kind.[3] The object of the rule is to indemnify the winning

party for the expense of contesting the claim or defence which the court rejected in the end and to discourage the bringing of actions or the raising of defences that lack merit. The rule would apply to damages actions under section 31.1 of the Combines Investigation Act, unless the statute is amended to provide to the contrary. By contrast, in American jurisdictions the successful party in litigation usually has to bear the costs himself.[4] This section of the report examines whether the absence of treble damages recovery and costs rules on the American pattern will impair the utility of the proposed damages remedy in Bill C-2.

As to damages, it is clear that the larger the multiplier applied to the injury actually sustained, double, treble or whatever, the greater will be the incentive to sue and, incidentally, the deterrent value of the judgment. The prospective Canadian private enforcer will therefore not have the same encouragement to bring an action as his American counterpart. This could prove critical to the decision whether or not to litigate when the damages are reasonably substantial but are still not quite large enough to justify the expense and risk of litigation.

Like the prospective plaintiff in any type of litigation, the victim of a Part V violation who contemplates bringing an action will need to weigh carefully the benefits of success against the costs of defeat in light of his evaluation of the probable outcome. Though the loss suffered was substantial, the victim might still be deterred from suing by the fear of failure with its consequent costs liability. Of course, it is simply not the case that actions for sizeable sums will never be brought for anti-combines offences in face of the costs threat and the significance of the costs sanction ought not to be exaggerated. When the stake is really significant, some venturesome individual will no doubt consider the attempt worthwhile and bring an action despite the

hazards. But this is certainly not true of the victim whose loss is only small. In the complex area of competition law a successful outcome for litigation will invariably be problematical and the costs threat is a positive disincentive to the individual whose claim is not large. A citizen who has sustained a $50, a $500 or even a $5,000 loss will hardly be disposed to assume the heavy burden of proving a combines violation when the certain price of failure is a costs liability of thousands of dollars, apart altogether from the costs he will have to pay his own lawyer.

Significance For Anti-Combines Enforcement

That the rules as to costs will tend to discourage the small claimant from pursuing the damages remedy created by section 31.1 of the Combines Investigation Act will not be a unique situation. Costs rules discourage the litigation of small claims irrespective of the nature of the dispute. However, the costs deterrent does have a special significance for small claims in the context of section 31.1. Business conduct that is prohibited by Part V of the Act will often have widespread repercussions. It may affect a multitude of transactions and possibly injure many people. Collusive price fixing and deceptive or misleading advertising in the sale of goods and services to the public are good examples. No one is likely to sue for damages if individual losses are small, particularly when failure would mean a heavy costs burden, and since the loss is only slight the victims will not suffer greatly if they are not compensated. The offending business, however, is left to retain the accumulated profit from numerous transactions.

The consequence that a combines offender will not be held accountable in damages because the injury inflicted was not sufficiently substantial to warrant litigation is arguably not of much concern when the business had acted in good faith and had believed

honestly that its conduct was lawful. Whether or not a particular business practice actually violates the combines legislation is sometimes a genuinely debatable question, the matter remaining uncertain until the court has decided the issue. The situation is serious, however, where the business committed the offence willfully, knowing that its conduct was unlawful. The intentional offender who is prepared to exploit the weak litigation position of consumers can secure immunity from damages liability by the simple expedient of carrying out the offending transaction a sufficient number of times to yield the desired profit, but ensuring that individual losses are so small no one will trouble to sue. This is hardly a satisfactory situation.

Individual damages judgments would compensate the victims of a combines offence and act as a deterrent by denying potential offenders the incentive to engage in anti-competitive behaviour. Of the two objectives, compensation and deterrence, the latter is perhaps the more important when many have sustained a small loss. The imposition of an adequate penalty on conviction for the offence would have the same deterrent value, but given the limited resources of the government enforcement agencies it cannot be assumed that a combines offender will always be prosecuted nor can it be assumed that if the offender is in fact prosecuted to conviction a proper deterrent sentence will be imposed. The thesis of this report is that for the foreseeable future the public enforcement of the combines legislation will not reach optimum levels and that private damages litigation can contribute to the effort.

VI: FOOTNOTES

1. For information on the volume of antitrust class actions, see Committee on Commerce, United States Senate, Class Action Study, 6-7 (1974), showing class actions in the District of Columbia. Nationally, in 1972, of all class action cases, civil rights cases constituted 43 per cent, securities cases, 10 per cent, and antitrust cases, 9 per cent. (Dam, "Class Actions: Efficiency, Compensation, Deterrence and Conflict of Interest", 4 Journal of Legal Studies 47, 52 (1975)).

2. Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F. 2d. 161, 168 (1973). See also Neville, "Antitrust Treble Damages Suit...The Fees Of It!", 37 Michigan State Bar Journal 20 (October 1968); Note, "The Nature of 'A Reasonable Attorney's Fee' In Private Antitrust Litigation", Washington University of Law Quarterly 102 (1966).

3. Mitchell v. Vandusen (1887), 14 O.A.R. 517; Vipond v. Sisco (1913), 14 D.L.R. 129, 131; Orkin, The Law of Costs, 16 (1968).

4. See Chapter VIII, second section, intra.

VII. CLASS ACTION ENFORCEMENT OF DAMAGES REMEDY

Function

The inclusion of a class procedure in the combines legislation could help promote damages litigation when by reason of the small amount of individual losses few, if any, persons would sue for themselves. A class action would unite in one proceeding for a single adjudication the claims of all individuals having substantially the same grievance against the defendant, a Part V violation resulting in damage to them all. Judgment would secure for everyone the compensation that otherwise each would have foregone, and fix the defendant with liability for the total damage caused by the commission of the offence. The imposition of total damage liability would also strengthen the deterrent potential of the damages cause of action.

However, the utility of the class action in private damages litigation under the combines legislation will by no means be restricted to situations where damages are small. The procedure will also be valuable where the offence alleged has caused significant loss to individual class members, loss so substantial as to warrant serious consideration by individuals of the desirability of separate actions. A class action in this situation would serve the original rationale of the procedure, namely, the saving of time and expense for the courts and the parties by avoiding a multiplicity of proceedings. The collective presentation of claims could also produce important tactical advantages for class members that might not be forthcoming if each were to sue separately. For instance, it would encourage the members to pool their resources of information, personnel and finance in preparing for the critical common question against the defendant, namely, the commission of a Part V violation.

Class Action Rationale

It is certainly the intent of section 31.1 that persons injured by a Part V violation should not have to bear the loss and that in proceedings which they bring themselves the offender will be ordered

to pay compensation. Also, it is reasonable to assume that the damages remedy was intended to operate as a deterrent by denying the offender the rewards of the offence. Now if it can be demonstrated that a class action procedure would facilitate the litigation necessary to accomplish these compensatory and deterrent objectives, then it is quite consistent with the underlying purpose of section 31.1 that damages recovery on a class basis be allowed. The argument for the procedure is especially strong if in some situations there would be no litigation at all unless those injured could sue as a class. It is submitted that the class action concept does advance the policy implicit in section 31.1. Judgment in a class action will extract from the defendant the same sum that would have been recovered if each and every victim of the offence had brought a separate action, and provided that class members are identifiable, the judgment will effect the same compensation as would be accomplished in separate proceedings. Moreover, since it cannot be assumed that every Part V offender will be prosecuted in the criminal courts, a substantial damages award could effectively substitute for a fine as a deterrent.

Enforcement of the damages remedy created by section 31.1 will help promote the competition policy that underlies the combines legislation. Given that the necessary litigation would be facilitated if claimants could sue as a class, and that in some situations there would be no litigation at all unless the claims could be so presented, the question becomes one of fashioning the appropriate machinery provisions.

Special provisions that will allow the class action enforcement of the damages cause of action are contained in the Appendix. They were summarized earlier in Chapter 4 of the report. The next section of this chapter will examine the subject of class action notice, a characteristic of the procedure that has presented some difficulties in the United States.

United States' Provision for Class Notice

Under the class action procedure that has applied in U.S. Federal Courts since 1966, a procedure that many states have adopted, the existence of separate questions that might require independent adjudication has not restricted unduly the bringing of class actions. Notice to the class, however, has been an obstacle in a number of cases. The Federal Rule (F.R.C.P. 23) requires the court "to direct to members of the class the best notice practicable under the circumstances, including individual notice to all class members who can be identified through reasonable effort." The Rule is intended to secure for class members their constitutionally guaranteed right to due process. Notice under the Rule will inform members of the class of the commencement of the action and give them the opportunity to be excluded if they so wish. The notice will advise that unless members are excluded, judgment in the action, whether favourable or not, will bind them.

Compliance with the notice requirement ordinarily presents no difficulty if a class is not large and the members are identifiable. Individual notice can then be effected. Nor, at the other extreme, is compliance a problem when the class members are not known and they cannot be identified through reasonable effort. In that event, "the best notice practicable under the circumstances" for the purpose of the Rule usually means the publication of notice in the press or on radio or television giving the requisite information. The situation is difficult, however, when the class is very large and many class members are identifiable. To comply with the notice rule, the plaintiff must give individual notice to the class members who are actually identified, and at his own expense, at least initially. Understandably, the plaintiff will be somewhat reluctant to assume this burden when the class members to be given notice are very numerous and his own claim is not very large.

The facts of Eisen v. Carlisle and Jacquelin,[1] a case that reached the United States Supreme Court, illustrate the notice problem. No other class action has received greater publicity. The vast size of the plaintiff class and the variety and complexity of the procedural problems that it has presented help explain its notoriety. Eisen brought a class action on behalf of odd-lot traders on the New York Stock Exchange against two brokerage firms claiming treble damages for violation of the antitrust and securities laws. The class numbered 6,000,000, of whom approximately 2,250,000 could with reasonable effort be identified by name and address. The Supreme Court held that Rule 23 required that individual notice be sent to the 2,250,000 class members, and that notice by mail was the "best notice practicable." Stuffing and mailing each individual notice form would cost the plaintiff $315,000. However, the average sum claimed by class members was a mere $3.90 and the damages sought by the plaintiff himself were just $70.

Notice to the Class in Canada

In devising a class action procedure for the Bill C-2 damages remedy it should be possible to avoid the notice problems that have been encountered in the United States. Notice practice in that country is governed by Federal Rule of Civil Procedure 23, as interpreted by the Supreme Court in Eisen, or by its state equivalent. The Rule itself reflects constitutional requirements of due process which point to minimum standards of notification for the validity of a judgment that purports to bind absent persons. By contrast, no constitutional guarantee mandates notice in class actions brought in Canada, and in fact the class action procedure in all jurisdictions makes no provision whatever for notice to members of the class, at least not before judgment.[2] Nevertheless, there are sound practical grounds for requiring notice in some cases, though not to the same extent that United States' procedure demands.

This report has earlier pointed out the risk of prejudice that a class action can pose for class members who do not get notice of the proceedings.[3] Judgment in a class action constitutes an exception to the ordinary rule that a judgment binds only the actual parties to the proceedings. In a class action an adverse judgment will preclude members of the class from bringing their own action, whether they receive notice of the proceedings or not. Prior notice to a class member who wanted to sue for himself would have allowed him to exclude himself from the class and thus avoid the binding sweep of an unfavourable verdict. A member in this situation would suffer real prejudice if initially the prospects of success in the class action were reasonably good but the claim was subsequently defeated on account of the incompetence of the plaintiff or of the lawyer whom he had engaged. On the other hand, the class member could not properly claim to have been prejudiced if the case for the class was well presented at the trial and the action defeated on the merits. The quality of the representation for the class offered by the plaintiff and his lawyer is thus a key factor in assessing any prejudice to the class resulting from the absence of notice.

Another factor is the size of individual claims. This affects the question whether some class members were in fact intending to sue separately themselves. The smaller the claims the less likely it would be that anyone in the class did so intend. If no class member proposed bringing an action for his own claim, the absence of notice would not actually prejudice any of the members if the class action were subsequently defeated.

In devising measures to reduce the risk of prejudice to class members from an adverse judgment the competence of the representative plaintiff and notice to the class are two questions that cannot really be separated. The draft legislation in the Appendix to this report deals with both of them. It is proposed

that within a short time after a class action has commenced the plaintiff will be required to obtain leave from a judge of the court to continue the proceedings as a class action. One condition for the grant of leave will be the competence of the plaintiff to adequately present the claims of class members. Among the matters which the court will be free to consider on this inquiry are the resources which the plaintiff has at his disposal to vigorously and effectively pursue the claim. Also, the proposed legislation gives the court a discretion to direct notice to the class. Notice to class members will enable them to opt out of the class, and it might also aid the court when it scrutinizes the competence of the plaintiff to act as representative. The court's decision on this question will be better informed if class members, alerted by the notice to the plaintiff's assertion of a claim on their behalf, are moved to present their own assessment of his ability to properly represent them.

In contrast to the United States' position, the proposed legislation gives the court a discretion not to order notice even though class members are identifiable. In deciding whether or not notice should be given the court will be expected to balance the cost of notice against the risk of prejudice to class members if they do not learn of the action. Thus, if the amounts in issue are so small that no individual will be likely to sue for himself, notice could probably be of a minimal kind or perhaps even dispensed with altogether. The court also has a discretion as to the form of any notice. The court will be free to direct notice by advertisement as an alternative to individual service. When individual notice is directed, the court will have to determine the extent of service, whether on a random sample or on all of the class members who can be identified.

VII: FOOTNOTES

1. 479 F. 2d 1005 (1973), aff'd 96 S. Ct. 2140 (1974).

2. See Shabinsky v. Horwite (1973), 32 D.L.R. (3d) 318, referred to in Chapter 3, note 11.

3. Chapter 3, third section.

VIII. CLASS ACTION INCENTIVE

Costs Deterrent

The critical question concerning the feasibility of the class action as a measure for enforcing the damages remedy is whether a class action will ever be brought in view of the costs rules that prevail in Canadian jurisdictions at present. What incentive is there for the member of a prospective class of injured persons to sue as a class representative? The hypothesis that constitutes the principal justification for bringing the class action procedure into the Combines Investigation Act is that the procedure is required to encourage the enforcement of the damages remedy when individual losses are not large enough to make separate proceedings practicable. A subsidiary reason for including the procedure is that with claims of a size sufficient to warrant independent litigation the collective presentation accomplished by a class action can achieve economies of time and expense and also promote co-operation among class members in seeking success on the common question.

The special difficulties of establishing a Part V violation and consequent injury will make even the individual who has a sizeable claim hesitate before bringing an action. What then does the person who has only a modest claim stand to gain by bringing an action on a class basis? The representative earns no bonus for bearing the burden of the action; if the litigation results in a damages award, the plaintiff will simply get compensation for his actual loss. Since the representative claim will by definition be typical of the claims of the class, the members themselves would equally have no incentive to sue. Thus, though a class action might in a particular case help advance the competition policy of the legislation, none of the individuals qualified to sue as a representative on behalf of the others has any inducement to take the necessary initiative.

The real obstacle to effective class litigation for small damages claims in Canadian jurisdictions will not so much be the size of the representative plaintiff's loss but his costs liability if the action fails. The rule of costs indemnity for the winning party applies also to class actions, except that class members are in the anomalous position that though they can participate in the recovery if the action succeeds, they will not be liable for the defendant's costs if it fails.[1] Nor in that event are they responsible for the costs of the plaintiff's lawyer, unless they had previously agreed to make a contribution. For the class representative, however, the consequence of defeat in the action is liability for two sets of costs.

Just one person is needed to bring an action for a class. If a class action plaintiff was not threatened by the potential costs liability following defeat, it is reasonable to expect that a member of the prospective class normally would volunteer and bring proceedings on behalf of all even though his own claim was not very large.

Contingent Fee in United States

In the United States factors such as the small size of individual claims and the problem of proving the common question of liability appear not to have discouraged class action litigation. Individual members of a prospective class have come forward to sue as representative. The explanation lies largely in the distinct system for the costs of litigation that prevails in American jurisdictions. The two features that distinguish it from the system in this country are the no-costs for the winning party rule and the contingent fee remuneration of the plaintiff's lawyer.

With few exceptions, the ordinary rule in American courts is that the successful party will not be awarded costs against his opponent.[2] This means that where

the plaintiff is the successful party, costs will be paid out of the recovery. The attorney's fee will comprise the bulk of the costs, with the attorney's disbursements and court fees making up the balance. The exceptions to the general costs rule arise mainly under statute. Some statutes allow court fees only to be recovered,[3] while in certain special fields of litigation, for instance, antitrust and civil rights, the plaintiff can recover all costs including a reasonable attorney's fee.[4] The defendant must pay these costs in addition to any damages awarded to the plaintiff.

"A contingent fee can be defined as a fee for services performed on behalf of a client who is asserting a claim, payable to a lawyer if, and only if, some recovery is achieved through the lawyer's efforts. Its distinguishing characteristic is the negative: if no recovery is obtained for his client, the lawyer is not entitled to a fee."[5] Though lawyer and client are free to agree that the lawyer is to receive a fee whatever the result, "the contingent fee is the dominant system in the United States by which legal services are financed by those seeking to assert a claim."[6] Personal injury, antitrust and class suits are the litigation areas in which the contingent fee is most visible, and it is now so widely utilized for these proceedings as to be commonly identified with them.[7]

The contingent fee contract is usually made at the time the lawyer agrees to act for the prospective client. Under most contracts the lawyer will be entitled to a percentage of any recovery, the precise share usually being based on the recommended fee schedule of a local or state bar association. In some situations, however, notably in antitrust litigation, the amount of the contingent fee is set by the court. Although the lawyer may have a contract with the plaintiff to receive a fixed fee whatever the outcome, the usual practice is to look to a court award against the defeated defendant for all or most of the fee.[8]

Section 4 of the Clayton Act entitles a successful plaintiff to a reasonable attorney's fee and in fixing the amount the contingent nature of the fee is one matter the court will consider.[9]

Contingent Fee in Canada

A contingent fee for the plaintiff's lawyer is not unknown in Canada. Seven jurisdictions (Alberta, British Columbia, Manitoba, New Brunswick, The Northwest Territories, Nova Scotia and Quebec) allow contingent fees,[10] subject to conditions.[11] Nevertheless, it seems that this method of lawyer remuneration is not widely used even in these jurisdictions. The normal fee arrangement applying fairly universally in Canada is for the lawyer to receive a fee certain, the amount being measured by the value of the services performed. Win or lose, the plaintiff must pay the fee, though if the action succeeds, a substantial part of the fee, if not the whole, will be recovered from the defendant as the costs of the action.[12] Of course, the lawyer for the plaintiff can always forego part or all of the payment due to him from his client. Indeed, he may have no alternative if the plaintiff is without means. In certain fields of litigation practice, particularly personal injury, it is not uncommon for an arrangement to be reached between prospective plaintiff and lawyer, tacitly if not expressly, by which the lawyer will not receive a fee if the action fails, but if it succeeds he will get a fee out of the recovery and costs awarded against the defendant.[13] This arrangement helps the plaintiff who cannot afford to pay the lawyer's fee himself, and with the introduction of legal aid it is probably employed less frequently now than in the past. Not surprisingly, it will not readily be entered into by the lawyer unless he is satisfied that the prospects of success are reasonably good. The arrangement constitutes a contingent fee in the sense that the lawyer has no expectation of remuneration unless the action succeeds. However, the fee is not truly a contingent fee of the kind recognized in the United

States and in Canadian jurisdictions that expressly allow such a fee for the reason that the contingency factor is not reflected in the quantum of the reward. The lawyer will be allowed no more for the fee than what he would receive if he were to be paid in any event.

Removing Costs Liabilities

The plaintiff with a small claim who sues for a class in an American jurisdiction has no more to gain from the litigation than a prospective class representative in this country who has sustained a similar loss. The critical difference is that the United States plaintiff is under no costs disincentive. The lawyer not his client carries the costs burden of the litigation. If the action fails, the plaintiff pays neither a fee to his lawyer nor the costs of the defendant. The lesson for the class action enforcement of the damages remedy created by section 31.1 of the Combines Investigation Act is clear. For the procedure to be effective, it is not sufficient that the plaintiff not be held responsible for the costs of his own lawyer, whether this situation results from a contingent fee or from some other scheme. The plaintiff must also be relieved of liability for the defendant's costs in the event the action fails. It will not be until the fear of liability for both lawyer's fee and defendant's costs is removed that the prospective representative plaintiff will be disposed to commence a class action.

VIII: FOOTNOTES

1. Markt & Co. v. Knight Steamship Co., (1910) 2 K.B. 1021 at 1039; John v. Rees, (1970) Ch. 345 at 372; Moon v. Atherton, (1972) 2 All E.R. 145; Farnham v. Fingold, (1973) 2 O.R. 132 (C.A.).

2. Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 at 717-19 (1967); Note 53 Columbia Law Review 78 (1951); Ehrenzweig, "Shall Counsel Fees Be Allowed?", 26 California State Bar Journal 107 (1951); "Reimbursement of Counsel Fees and The Great Society", 54 California Law Review 792 (1966).

3. Note, 53 Columbia Law Review 78 (1951).

4. Dawson, "Lawyers and Involuntary Clients in Public Interest Litigation", 88 Harvard Law Review 849 (1975).

5. MacKinnon, Contingent Fees For Legal Services, 3 (1964).

6. Ibid, 2.

7. Ibid, 25.

8. Ibid, 26.

9. Cherner v. Transitron Electronic Corp., 221 F. Supp. 55, 61 (1963; Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F. 2d 161, 168 (1973)).

10. See Arlidge, "Contingent Fees", 6 Ottawa Law Review 374 (1974); Canadian Bar Association, Code of Professional Conduct, Chapter X, Rule 8 and note (1974).

11. For instance, that the agreement be in writing, signed by the client and filed in court.

12. The costs payable by the losing party are usually somewhat less than the costs which the winning party will have to pay his own lawyer. In short, the costs award does not provide a complete indemnity. This is an additional disincentive to sue for the prospective plaintiff with a small claim. However, it should not be a problem in litigation under the Combines Investigation Act as section 31.1(2) seems to contemplate that a successful plaintiff will be entitled to recover from the defendant whatever costs are charged by his own lawyer, provided of course the amount is reasonable.

13. This arrangement is invalid in Ontario (Solicitors Act, R.S.O. 1970, c. 441, s. 30), though in practice it is entered into. In the provinces that permit contingent fees, the lawyer is allowed to receive a previously agreed percentage of the judgment amount. In Ontario an agreement for a share of the recovery is invalid even though the lawyer's remuneration is not contingent but payable in any event (Solicitors Act, s. 30).

IX. COSTS PROPOSALS

Removing Costs Disincentive

Legislation could remove the twin costs liabilities that will burden the plaintiff suing for damages under section 31.1 of the Combines Investigation Act on behalf of a class. But whether or not the liabilities should be removed is of course another question. If it is decided that the plaintiff ought to be relieved of responsibility for costs, the precise method by which legislation could achieve this result needs to be carefully considered.

The responsibility of a plaintiff for the costs of his own lawyer and his potential liability for the defendant's costs are strictly separate matters, though in devising a costs scheme for a damages class action under the Act they are inextricably connected. Neither can be dealt with in isolation. In the discussion that follows, two basic alternative proposals are made for removing the costs disincentive facing the prospective class action plaintiff. The proposals present a choice as to the arrangement for payment of the fee of the plaintiff's lawyer - between a contingent fee and a fee to be paid in any event out of a government fund. Variants of the basic alternatives concern the costs liabilities of the defendant if the action succeeds and his entitlement to costs if it fails. The alternatives have one feature in common - the costs immunity of the plaintiff. The representative plaintiff is not to be responsible for the costs of his own lawyer nor can he be ordered to pay the defendant's costs in the event that the defendant succeeds. As already noted, these are characteristics of the contingent fee system in the United States.

The following is an outline of the alternative proposals:

1. The lawyer for the plaintiff to be remunerated by a contingent fee, the fee being paid:

   (a) out of the damages recovered for the class, or

   (b) by the defendant in addition to the damages award.

As the plaintiff is not to be answerable for the defendant's costs if the action fails, considerations of fairness to the defendant suggest that in the event the plaintiff prevails, the damages award should bear the contingent fee and the defendant be excused from further liability. On the other hand, however, there is precedent for requiring the defendant to pay the lawyer's fee in addition to the damages in antitrust litigation in the United States under section 5 of the Clayton Act. Because of the contingent nature of the fee, the amount will be greater than what the lawyer would be allowed if he were to be remunerated for his time and effort irrespective of the outcome of the action.

2. The lawyer for the plaintiff to receive a fee certain, the fee to be calculated according to the value of his services and paid out of funds specially provided by the Federal Government.

The legal aid schemes that operate in the various provinces are a potential source of funding for class actions under the Act. However, they cannot really be relied on to finance this type of litigation. First, under some of the schemes, legal aid is either not available or is difficult to obtain even for class actions brought in accordance with existing provincial law and practice. Also, on political grounds it can be properly objected that funds provided by the provinces should not have to finance litigation to enforce federal law under federally devised court

procedures, possibly in a federal court. Finally, legal aid is usually designed for litigants who cannot afford the expense of a lawyer. In many cases the justification for litigating damages claims under section 31.1 as a class will not be that the representative plaintiff is too poor to engage a lawyer, but that his claim, which will typify the claims of the class, is just not large enough to warrant an action merely for his own benefit. The representative will not refrain from suing independently for want of means but rather for want of any economic incentive to do so. Thus, even if provincial legal aid schemes were to support class actions, a representative plaintiff may fail to qualify for assistance because he can afford a lawyer's fee.

The second proposal for payment of the fee of the lawyer for the plaintiff in any event out of a government fund suggests a number of different ways of apportioning the litigation costs:

(a) no costs recovery for the successful party, whether plaintiff or defendant. Win or lose, the government fund would pay the plaintiff's costs and the defendant would bear his own.

(b) if the action succeeds, the fund to recover from the defendant the costs advanced to the plaintiff, the payment to be made either out of the damages awarded against the defendant or separately by the defendant in addition to the damages. Under this arrangement the public revenue would subsidize only the litigation that failed.

(c) if the action were defeated, the defendant could be allowed costs out of the fund. The justification for this arrangement would be that if the defendant is to be required to reimburse the fund for costs if an action succeeds, it seems only fair that the fund should pay the defendant's costs if the action is defeated.

No Costs Liability for Plaintiff

The selection of an appropriate costs scheme from among the various proposals requires initially a choice to be made between the two alternative methods for remunerating the plaintiff's lawyer - a contingent fee or payment from a government fund. However, before considering the respective advantages and disadvantages of these alternatives, it is necessary to examine the premise that underlies each of the costs schemes. This is the proposition that the class action plaintiff is to be relieved of all personal liability for costs.

What justification is there for abrogating the traditional costs rules for the benefit of a plaintiff who brings a damages class action for a combines offence, particularly the rule of liability for the defendant's costs if the action fails? The answer lies in the special public importance of this type of litigation. The gains from a successful class action can extend well beyond the immediate beneficiaries, the plaintiff and class members whom he represents. Indeed, in many situations individual recoveries may be quite small. Nonetheless, damages liability to every victim of anti-competitive behaviour rather than to just an isolated few, has such value as a deterrent in securing the observance of the competition laws generally that the public as a whole has a vital interest in the viability of the class action concept, especially when it is not certain that government will have the resources to invoke the criminal process against every suspected offender.

Another reason for relieving the class action plaintiff of the usual costs obligation concerns the financial situation of the respective parties. Generalizations are apt to oversimplify and hence may mislead. However, it is fair to predict that if class actions under the Act were allowed, the typical proceeding will involve a class of consumers or small businessmen and a corporation, the assets of which greatly exceed those of any single member of the class including the representative plaintiff. There will, of course, be exceptions, but in the majority of actions it can reasonably be expected that the defendant will bear the costs of a successful defence with less hardship than the plaintiff if he were to be made responsible for them. Also, the impact of the costs burden for the defendant is less severe than first appears as the expense is allowed as a deduction for income tax purposes, a concession the plaintiff will not enjoy if he were ordered to pay costs, unless he had sued as the proprietor of a business, for instance, to recover lost profits.[1]

Also, it is believed that the occasions for applying the rule of no costs recovery for the defendant will occur very often. The procedure for holding an inquiry into the merits of a class action, which is outlined in the next section, will provide a check on claims of questionable worth. For such claims the procedure means that an action will not be brought at all or, if an action is brought, that it will be quickly eliminated and so never reach the trial stage. The procedure will allow the court to order the plaintiff to pay the defendant's costs if leave to continue the action as a class action is refused. It is likely, therefore, that of the class actions that are commenced only a small minority indeed would be disposed of at trial in favour of the defendant. The rest would terminate by judgment at trial for the plaintiff or by compromise and in neither case does the court ever award the defendant costs.

It is recognized that for a defendant in a weak financial situation the denial of costs recovery for a successful defence might be unjust, particularly if the plaintiff could afford to pay them. This might occur if the plaintiff represented numerous small traders who had combined to recover damages for business losses. But as against the occasional hardship that might result for defendants from the denial of costs recovery has to be set the advantages that follow from removing the obstacles that discourage resort to class actions. That the costs proposal will sometimes hurt is a price that must be paid to secure a procedure for competition enforcement that will work. Applied sensibly, the test of a preliminary scrutiny should ensure that the occasions when a defendant loses the customary costs award against a defeated party will seldom occur.

Safeguards Against Abuse

The proposal that the class action plaintiffs should be under no obligation to pay the defendant's costs if the action fails is certain to provoke opposition. It will be objected that a class action brought under the combines legislation has no special significance such as would justify making an exception to the usual costs rules of litigation. Yet the proposal is not entirely novel. Respectable precedent is to be found in the 1974 Report of the Ontario Task Force on Legal Aid. The Task Force was assembled for the purpose, inter alia, of examining and evaluating the effectiveness of The Ontario Legal Aid Plan over the time of its operation and of recommending modifications required to provide legal assistance not presently available. The comments on class actions, referred to as group actions in the Report, are worth quoting in full:

> The question of legal costs generally, and the extent to which they should be awarded by courts or tribunals, cannot really be said to be included in our mandate.

However, we are emboldened to suggest at this point that it is no longer self evident that costs should follow the event. So much of today's litigation involves contests between private individuals and either the state or some public authority or large corporation that the threat of having costs awarded against a losing party operates unequally as a deterrent. The threat of costs undoubtedly works heavily against groups who seek to take public or litigious initiatives in the enforcement of statutory or common law rights when the members of the group have no particular or individual private interest at stake. We would therefore propose an amendment to The Legal Aid Act casting upon a successful respondent in any such proceedings the burden of satisfying the court or tribunal before costs are awarded in his favour that no public issue of substance was involved in the litigation or that the proceedings were frivolous or vexatious.

We respectfully suggest that the time is ripe for a review of the whole question of costs by the Ontario Law Reform Commission or some other appropriate body. Meanwhile, we have no doubt that the spirit underlying the principle of Legal Aid and today's legislative recognition that public participation is desirable when serious public issues are at stake, justify a departure from the rule. To grant group certificates in proper cases is not enough. The deterrent threat of being mulcted in costs is often more than enough to inhibit a group of genuinely concerned citizens from proceeding against a public authority or a large corporation though vital public issues may be at stake.[2]

Critics of the costs recommendation of this report will note that the threat of costs liability is a check on frivolous proceedings and argue that there is a special justification for retaining the check in the case of class actions. A class action can pose a liability of massive dimensions for a business enterprise and without the costs sanction there is a danger that the procedure will be exploited in order to coerce the defendant into making a substantial settlement, even where the claim is of dubious worth. Though the claim is questionable, a business with insufficient assets to meet a judgment for an entire class might really have no alternative but to reach a compromise with the plaintiff. A miscalculation as to the prospects of defeating the action could mean the destruction of the business. The costs proposal, it will be argued, will encourage abuse of the class action procedure since a prospective class representative will have nothing to lose but everything to gain (his lawyer being the principal beneficiary) by bringing an action.

These criticisms have considerable merit, and it is recognized that in devising a scheme to remove the obstacles that deter claimants with genuine grievances from suing, care must be taken to ensure that the door is not opened for the huckster and the cheat. The draft legislation proposed at the conclusion of the report contains a provision that will help safeguard defendants against class actions that are brought in the hope of forcing the defendant to make a settlement offer and with no intention that the action should be allowed to reach the stage of a trial on the merits.

Within a short time after a class action is commenced the representative plaintiff will be required to apply to a judge of the court in which the action is brought for leave to carry on with the proceedings as a class action. The defendant will be given notice of the application and have the opportunity to appear before the judge and oppose it. In order to obtain leave, the plaintiff

will have to satisfy the court that the action is brought in good faith and appears to have merit. As further conditions of the grant of leave the court will need to be satisfied as to the sufficiency of the common interest of the plaintiff and class members and of the ability of the plaintiff to protect the interests of the class. Only when the plaintiff meets all these tests and gets leave to proceed with the class action will he gain the costs privilege.

The inquiry into good faith and the appearance of merit will require the court to make a preliminary evaluation of the plaintiff's prospect of success on both the facts and the law. It will be a critical stage of the action as the plaintiff's right (and probably his financial ability) to continue the class action will depend on a successful outcome. Since the inquiry is so important for both parties it is likely to involve a fairly careful investigation by the court of the plaintiff's motives and the merits of his demand. The inquiry will certainly eliminate claims that are only of questionable validity or claims that clearly are brought to force the defendant to make a settlement. Indeed, the very existence of the inquiry should deter class actions for such claims from even being commenced.

Courts should not prove unduly reluctant to refuse leave to proceed for after all the refusal terminates only the claim of the class and the plaintiff is free to continue the action for his individual relief. But how successful the machinery will be as a filter when claims presented in undoubted good faith have no more than a semblance of merit is another matter. Opponents of the scheme will contend that the requirement of apparent merit is not sufficiently stringent and that many actions that meet the test will nonetheless be defeated at trial, leaving the defendant to carry the costs of its successful defence. To impose any stricter standard on the plaintiff, however, would make the preliminary inquiry virtually the trial of the action, and thus defeat the purpose of the

procedure, which is to enable a claim for a class that prima facie is creditable to be adjudicated on, while relieving the representative of any anxiety that he will be liable for costs if a fuller investigation discloses that the claim cannot be substantiated. How effective the measure will be in relieving the concerns of defendants will have to await the test of experience with actual cases.

Precedent for the preliminary scrutiny of the plaintiff's claim is to be found in the statutory provisions that regulate shareholders' derivative actions. In Ontario, for instance, section 99 of the Business Corporations Act[3] allows a shareholder of a corporation to sue on behalf of himself and all other shareholders to enforce any right or duty owed to the corporation that could be enforced by the corporation itself. However, the section further provides that an action is not to be commenced unless the shareholder first obtains the leave of the court.[4] It has been held that the court ought to allow an action to be brought when the shareholder applicant is acting in good faith and where the intended action does not appear frivolous or vexatious and could reasonably succeed.[5] It can be expected that the court would apply a similar test in determining whether a class action should be allowed to continue.

Section 99 of the Ontario statute resembles the proposed class action procedure in another respect. Once a shareholders' action is commenced the court has power to order the corporation to pay reasonable interim costs to the plaintiff. The actual details of this provision are of course quite different from the class action proposal, but the scheme is important because the legislature has recognized the principle that where the commencement of litigation that would benefit individuals other than the immediate parties is inhibited by problems of costs, there are situations that warrant the making of special costs provisions in order to facilitate the litigation.

The procedure which the draft legislation proposes will put the onus on the plaintiff to obtain leave to continue the action as a class action. If the plaintiff fails to apply for leave within the time stipulated in the statute, or, if on such application, leave is denied, the plaintiff will cease to act in a representative capacity and the action will proceed as an ordinary action with the plaintiff suing just for himself.

Finally, a costs provision in the mechanism for the plaintiff's application for leave will provide a further check on unmeritorious proceedings. The plaintiff is immune from liability for costs once he gets leave to continue the action as a class action, but if he fails to apply for leave, or if he applies but leave is refused, the court may order him to pay the costs of the defendant.

No Costs Liability for Plaintiff - A Second Look

What underlies the costs scheme for class actions under the Act is the proposition that unless the costs disincentive that exists under present rules is removed no individual who has only a small claim will bring a class action on behalf of others similarly situated. The scheme thus facilitates the litigation of small claims, an objective which constitutes what is perhaps the principal justification for introducing the class action procedure into the combines legislation. But another justification for importing the procedure is that it can achieve significant economies of time and expense by securing the adjudication of the claims of many people in a single proceeding where otherwise a number of separate actions might have been brought against the defendant, the anti-competitive behaviour in question being likely to generate separate actions because individual claims are sufficiently substantial to make them worthwhile. What good reason is there for allowing the class action plaintiff special costs privileges in this situation?

Ideally, at this stage the plaintiff is required to demonstrate good faith and the appearance of merit, the court should have power to either grant the plaintiff the costs immunity or withhold it. In the exercise of this kind of discretion the court could direct that the ordinary costs rules should apply if it concluded that the personal claim of the representative plaintiff was of such magnitude it was likely that if a class action was not allowed the plaintiff would still have sued for his own relief, the court possibly surmising that costs immunity provided the real motive for the plaintiff suing as a representative. The court could also make the same direction if due to the relative financial position of the plaintiff (which might reflect any resources available from class members) and the defendant it would be unjust to make the defendant bear its own costs in the event the action failed.

The notion that the court should have a discretion as to the application of the costs immunity is appealing, but this report concludes that it would not be workable in practice. First of all, it is not possible to devise any criteria that would help the court in determining how its discretion should be exercised. Is the test to be that of comparative financial hardship or the likelihood that the plaintiff would have sued for his own claim whether or not he could also have sued for the class or the amount of the plaintiff's claim, with the costs of immunity being allowed for claims below a certain limit but not for those above, or something else? Next there is a problem in defining any test that is selected so as to give it any meaning. For instance, if comparative financial hardship is to be considered, the court would need to know what costs the defendant would be required eventually to pay and the amount would not be known at the time the decision to grant or withhold the costs privilege had to be made. Also, would the court take the assets of class members into account or look only to the asset position of the plaintiff? If the situation of class members was

relevant, the court could not safely assume that class members had agreed to contribute to the plaintiff's costs, but how far could it go in investigating the possibility that such arrangements had been made? Again, if a plaintiff with a claim above a certain amount was not to enjoy the costs immunity, the choice of the ceiling would necessarily be quite arbitrary. Would it be $50, $100, or $500? How would the choice of $500 be defended as against, say, $750?

The second objection to vesting a costs discretion in the court is that the inquiry into the existence of good faith and merits and as to the feasibility of a class action and the representative competence of the plaintiff will be time consuming enough without imposing any further burden on the court and the parties. An examination, for instance, as to comparative financial hardship or whether the plaintiff would have sued if he could not have brought a class action, assuming such vague criteria could be given any sensible meaning, could prove quite lengthy, with no limits set that would restrict the scope of the inquiry.

The final objection to the costs discretion concerns the element of certainty. Since it is not possible to define any acceptable criteria for determining whether a plaintiff ought to be allowed the costs privilege, the question would have to be left to the virtually unfettered discretion of the court. It would not then be possible for a person who was contemplating bringing a class action to know in advance what his costs situation would be in the event he obtained leave to proceed. This would be of critical importance to the prospective plaintiff whose claim was not large and who would be deterred from suing if the ordinary costs rules were to apply. For such a person a refusal by the court to extend the costs immunity would end the proceedings. Unless the individual knew that the costs privilege would follow the grant of leave automatically it is unlikely that he would take the trouble to sue. A lawyer would equally be as reluctant to become involved

in this situation. Assuming the lawyer were to act for a contingent fee, the existence of a costs discretion would interpose yet another uncertainty that might ultimately prevent the lawyer getting his reward. To fail to secure leave to continue with the class action is a tolerable risk for the lawyer to assume, since after all, whether or not the action will meet the test of merit and the other prescribed criteria is a matter the lawyer can judge for himself. However, this is not so with a costs discretion. It will be difficult to predict whether the court would grant or refuse the costs protection and since a negative decision would mean the end of a class action that otherwise was soundly based, the lawyer might well be inclined to rate the risk as unacceptable.

For the reasons outlined above, the report concludes that it is not practicable to give the court a discretion as to the costs immunity when it grants the plaintiff leave to continue an action as a class action. Nonetheless, it has to be conceded that as a result there may be cases where a plaintiff who was prepared to sue just for himself is able to avoid responsibility for the defendant's costs of a successful resistance to the claim by the simple expedient of suing on behalf of a class. If this does occur, and it may be difficult to discover whether it does or not, it is a price that must be paid to secure a procedure for competition enforcement that will work, a sentiment that was expressed earlier.

Contingent Fee v. Fee Certain

The grant of leave to proceed will relieve the plaintiff of costs liability to the defendant but his responsibility for the fee of his own lawyer remains. As indicated earlier, to remove this latter obligation requires a choice to be made between a contingent fee arrangement by lawyer and client on the American pattern and a government provided fee certain. The contingent arrangement would offer the prospect of a higher fee than the fee to be paid in any event in order to compensate for the risk that the lawyer might not receive anything. Also, the fee

would be paid by the defendant. Under the alternative proposal, the lawyer would receive a fee regardless of the outcome of the action, the fee to be paid out of a government created fund, possibly with the fund being recouped if the defendant were ordered subsequently to pay costs.

The selection of the appropriate method of payment involves an examination of the merits and disadvantages of the contingent fee. The contingent fee is an American invention and few features of legal practice in the United States have proved more controversial. The fee is known in Canada but its use is far from universal. Ontario, for example, does not allow contingent fee arrangements and resort to the fee seems to be infrequent in the six provinces that do.

The following quotation from Contingent Fees For Legal Services, a study of the contingent fee made by F.B. MacKinnon for the American Bar Foundation in 1964, summarizes well the arguments for and against the fee. The study was undertaken in order to evaluate present uses of the contingent fee and proposals for change, though no conclusion was reached advocating the adoption of any particular fee system:

> The basic objection to the contingent fee is the adverse effect it possibly may have on the performance of the bar's professional responsibilities, both in the case at hand and more importantly, in the future. The major arguments against contingent fees are that the gamble on the outcome introduces a speculative attitude toward law practice which is inconsistent with the detachment essential to a profession and that, because of the contingency, there is an emphasis on winning which tends to reduce the lawyer's self-restraint in negotiation

and trial advocacy, thereby endangering the effective operation of the adversary system of judicial administration. In addition, the financial rewards to the lawyer are so large as to encourage competitive solicitation of potential clients, impairing the professional disinterest necessary to sound advice to his client and weakening the ties between fellow lawyers which form one of the essential characteristics of a profession. Further, the lawyer acquires an interest in the lawsuit that might come between him and his client, not only concerning the amount of the fee but also over the control of the suit on such questions as whether to accept an offer of settlement. Finally, it is argued that giving the lawyer the right to finance litigation tends to motivate him to stir up lawsuits, both those that are supportable but would not be brought on the client's initiative and those that are groundless but have nuisance value, thus adding to the burdens of already overcrowded courts and contributing to an undesirable litigious attitude in the community.

Arguments in support of the use of the contingent fee are that its widespread use shows that it has obviously passed the pragmatic test and that no evils are discernible which can be attributed directly to its use. Its proponents maintain that it encourages able, speculative work in many areas of practice and has led to the developing use of the lawyer as an agent to support desirable social and business adjustments through his work for claimants on a contingent basis.

> Some argue also that it enlists the best efforts of the lawyer in behalf of his client and enables the lawyer to compete as an entrepreneur in our competitive economy, making use of his only assets---his skill, time, and office arrangements. Most important, perhaps, it is argued that no other system has been suggested which provides capable legal service to those unable to afford fees, without introducing more serious risks of destroying the independence of the profession.[7]

Whether the class action lawyer should act for a contingent fee or a fund provided fee certain in a sense calls for a choice between the lesser of two ills since each system undoubtedly carries a number of disadvantages. The decision is not an easy one, but on balance this report favours the contingent fee.[8]

The objection to a scheme for payment of the fee of the plaintiff's lawyer irrespective of result is not the danger of lawyer abuse of the procedure but the fact that government must be the source of funding. For the reasons given already, it is not realistic to expect provincial legal aid schemes to support class actions under the combines legislation, and the Federal government would have to provide the necessary assistance. However, a scheme for the Federal subsidy of class actions rests on a premise that is inconsistent with the justification advanced in this report for the class action enforcement of the damages remedy and for the removal of procedural obstacles, including liability for litigation costs, that would impair the utility of the procedure, namely, that for the foreseeable future the departments responsible for securing obedience to the combines legislation through the criminal law will not have all the resources needed for optimal enforcement, and that the private sector through individual and class actions has a valuable role to play supplementing public enforcement

activities. The adequacy of the Federal subsidy for class actions would similarly remain questionable for the future. More important, however, funds for class actions are funds not appropriated to criminal enforcement, where arguably they would be more usefully employed. The success rate in criminal proceedings is likely to be higher than in a civil action as the government agencies enjoy wider powers of investigation and have more expertise at their disposal than the ordinary litigant represented by a lawyer in private practice. The government in a criminal prosecution will face a heavier standard of proof than the civil action plaintiff, but on the other hand it will not have to establish that actual loss or damage resulted from the commission of the offence. Consequential damage is an essential ingredient of the private cause of action and in many cases it may be difficult to prove. The imposition of a penalty on conviction will not compensate any victims of the offence, but provided the amount is set sufficiently high, it will at least act as a deterrent.

The final objection to the fee certain method of lawyer remuneration is that the scheme would make the class action enforcement of the damages remedy dependent on the goodwill of government in providing funds. The great virtue of the damages cause of action lies in the opportunity it gives the private citizen to aid in implementing the competition objectives of the combines legislation and, incidentally, in providing a check on the activities of government. Damages recovery is founded on the commission of an offence; a prior conviction would help prove the fact of the offence, but it is not a condition of recovery. The damages claimant is therefore at liberty to pursue the competition offender whom the government has not or will not prosecute criminally. It would be somewhat incongruous for the government to subsidize civil litigation against a business for a competition offence when it had decided that it would not prosecute the business for the offence. In fact, there is a danger that aid would not then be forthcoming.

Reliance on government funding thus jeopardizes the integrity of the class action as an independent instrument of competition enforcement.

Quantum of Contingent Fee

The American Bar Foundation study and numerous other writings have reviewed the respective benefits and dangers of the contingent fee arrangement and it is really not appropriate to reproduce the various appraisals here. For the purpose of this report the quotation from the Bar Foundation study set out earlier sufficiently summarizes the situation.

The financial interest which the contingent fee creates in the litigation for the plaintiff's lawyer explains many of the evils assigned to the arrangement by opponents. Since payment depends on result the lawyer has a strong motive to employ any means, no matter how unethical, to secure success and there is a danger that he will in fact do so.[9]

A contingent fee contract usually provides that the lawyer will receive a stated share of any recovery. The lawyer therefore has a financial stake not just in the result, but also in the quantum of the defendant's liability. Critics of the fee argue that with this kind of arrangement there is a danger that the unethical lawyer will employ improper tactics to raise the recovery, for instance, by exaggerating the damages or by persuading the plaintiff not to accept a reasonable settlement offer. But while the lawyer working for a contingent fee will necessarily acquire a financial interest in the controversy, quantification of the fee according to the size of the recovery is a feature of the arrangement that is not essential, and it can be dispensed with. It is therefore proposed that the court should fix the amount of the contingent fee earned by a lawyer who acts for a plaintiff claiming damages under section 31.1 of the Act on behalf of a class. This follows the system for antitrust litigation in the United States.[10]

In determining the amount of the fee the court will assess the value of the services rendered by the lawyer. It will take the size of the recovery into account but this will not be a decisive factor. The contingent nature of the fee will be an important consideration as the lawyer will be entitled to be compensated for having assumed the risk of receiving nothing. This, with the added factor that combines legislation will require a heavy investment of time and skill, should result in the court allowing a fairly substantial fee.

The procedure for a court determination of the amount of the lawyer's fee will ensure that the lawyer gets a fair reward and at the same time eliminate the possibility that fees are recovered that are of unconscionable size. Also, since the amount of the recovery will not determine the quantum of the allowance but merely be a matter the court will consider, there will be less danger that the class action lawyer will endeavour to get damages for his client that are not deserved."

Source of Payment of Contingent Fee

Assuming the contingent fee proposal is implemented, the question of how the fee and expenses of the plaintiff's lawyer are to be paid must be decided. It will certainly be the responsibility of the defendant, but should these amounts be paid out of the damages recovered for the class or by the defendant in addition to the damages? In private antitrust actions in the United States an unsuccessful defendant must pay the fee of the plaintiff's attorney as well as the damages and it seems that the same rule applies when an action is brought on behalf of a class.

There are some strong arguments against requiring the defendant defeated in a class action brought under the proposed legislation to pay separately the fee of the plaintiff's lawyer. First, it can be objected that as plaintiffs have no personal costs responsibility, fairness demands that defendants also should have this

privilege if they fail in their defence. Denied costs recovery from the plaintiff, even a successful defendant will be penalized by a class action brought under the Act, as the proceedings are likely to be complicated and so the costs burden quite heavy. The situation of the parties would be in better balance if the defendant were not to be made liable for the plaintiff's costs and if instead the costs were payable out of the damages award.

Alternatively, if the defendant is to be made responsible for the plaintiff's costs in addition to the damages, it can be argued that the defendant should not have to pay the entire contingent fee of the plaintiff's lawyer, but that the costs liability should be limited to what the lawyer would receive if his fee were calculated according to the time and effort expended in securing the result, the measure of remuneration in ordinary litigation. The balance of the contingent fee would be payable out of the fund of damages recovered for the class. The arrangement would resemble the costs practice in ordinary litigation at present. Costs awarded against a defendant usually do not amount to a complete indemnity and the lawyer for the plaintiff will take part of his costs bill out of the damages recovered from the defendant.[12] The contingent fee is a fairly radical concept for many Canadian jurisdictions and should be incorporated into the class action framework with as little distortion of traditional cost rules as possible. The contingent fee gives the plaintiff's lawyer the necessary incentive to act. Its appeal is not diminished by apportioning responsibility for payment between damages fund and defendant. There is no need to threaten the defendant with a greater costs liability than what he would normally face.

These arguments for the defendant have merit. However, they assume that the damages recovery will be sufficient to pay the plaintiff's costs, and they also disregard the position of the class members, those for whom the action was brought. In many cases the size of the damages award is going to depend on the approach which the court takes towards the assessment of damages in class action claims. The mode of assessment will be a critical question for the class action procedure and it will be examined more closely later. At this point it is sufficient to note the problem. The question of the method of damage assessment will arise when the class is large, the members are not readily identifiable, and individual claims are small. In this situation damage distribution among class members is likely to be rather limited. However, it might be possible in some cases to calculate with reasonable accuracy the total amount of damage suffered by the class as a whole. The question then is whether the court should order the defendant to pay only the damages actually claimed by individual class members or whether the defendant should have to pay the total damages sustained by the class, leaving the court to dispose of the unclaimed balance in some way. If the defendant is not to be made separately responsible for costs, the damages fund which is to bear them may be large or small, sufficient for the purpose or not, according to the formula the court applies for the damages calculation.

The case for charging the plaintiff's costs to the recovery is stronger if damages are assessed on a total class basis. Then the unclaimed surplus will probably be sufficient to meet the payment and individual recoveries will not be diminished. On the other hand, if the defendant has to pay damages just to the class members who establish their entitlement, the damages fund constituted by the aggregated recoveries will not meet both costs and claims in full. First priority must go to costs and so claimants will have to share what is left. What portion of the original claim class members will actually receive, indeed, whether anything at all, will of course depend on the facts of the particular case.

It is difficult to prescribe a firm rule for apportioning responsibility for the plaintiff's costs between defendant and class members. Considerations of fairness and reciprocity might suggest that the defendant should pay just the damages, but on the other hand the compensatory objectives of the procedure and hence the position of class members cannot be disregarded. Though this report favours damage assessment for the class as a whole in the appropriate case, it is probable that the courts will in fact not take this approach but instead will limit the defendant's liability to what individual class members establish as their entitlement. In that case, if the defendant is not to pay the contingent fee in addition to the damages, the fee will certainly diminish, and possibly absorb completely, the sums due to class members.

The costs problem calls for a flexible approach and the solution which the report proposes is to give the court a discretion, exercisable within rather narrow limits, as to how the contingent fee of the plaintiff's lawyer is to be paid. The proposal is made on the assumption that the courts will hold the defendant responsible only to class members who establish their claims. If those claims are to be paid in full, there will be no surplus to bear the costs. It is proposed that in addition to the damages the defendant should at least be ordered to pay so much of the contingent fee as equals the amount the plaintiff's lawyer would be entitled to receive on a time and skill basis. (It is assumed that the contingent would be larger). This represents the extent of the defendant's cost liability in an ordinary action. Whether the defendant should have to pay the entire contingent fee is left to the court's discretion, and the damages recovery will bear the balance of the fee to the extent the court does not make the defendant responsible.

The compensation objective of a class action becomes of prime importance once a court decides that the liability of the defendant is to be fixed by reference to individual claimants rather than to the whole class. Therefore, on the question of how the plaintiff's costs ought to be apportioned, the defendant should have the onus of satisfying the court that the damages award should be made to bear portion of the costs. Furthermore, if the court does make class members share responsibility for the fee, it should ensure that they are left with a substantial portion of their original claims.

Additional Safeguards Against Abuse

The objection that the contingent fee encourages lawyers to attempt to lift the plaintiff's recovery above a reasonable level in order to get a higher fee has already been mentioned. Critics of the fee also object that the fee leads to client solicitation by lawyers. In a potential class action situation the lawyer could seek out a client and persuade him to become representative plaintiff for a claim which, though genuine, he had no intention of pursuing himself, possibly because he was quite ignorant of the fact that he had a right to sue until the lawyer approached him. Another objection to the fee is that it encourages lawyers to promote speculative actions.

The supposed danger that lawyers will chase clients for class actions is not really a consequence uniquely attributable to the contingent fee proposal. Any temptation for the lawyer to stir up class action litigation would be no less under the alternative proposal for a government paid fee certain. The danger of solicitation, however, is probably no greater than exists already in other fields of litigation, particularly personal injury cases. The activity constitutes a breach of professional ethics for which the offending lawyer will be disciplined and it can be assumed that provincial law associations, the bodies responsible for maintaining professional standards, will keep the same careful watch on possible

infractions in the case of class actions as they have in the past for other types of proceedings.

If the danger of client solicitation does exist, the courts themselves will help keep it in check. Section 3 of this chapter describes the procedure by which at the commencement of a class action the plaintiff will be obliged to satisfy the court that the claim is brought in good faith and appears to have merit. This step will discourage individuals without a genuine claim from starting an action and it should be no less effective against the lawyer who might seek to foment litigation for what essentially will be his own benefit.

Finally, another objection to the contingent fee should be mentioned. With some force, it is argued that the lawyer's substantial interest in the recovery leads him to settle cases at a time and in an amount which suits his interests but not necessarily those of his client. In a class action the situation is aggravated if the plaintiff, the only person whom strictly the lawyer represents, wants his own claim met in full but has little concern for what becomes of the claims of class members.[13]

Under the class action legislation proposed, the lawyer's fee will be fixed by the court whether the action is settled or disposed of at trial, and the fee will be assessed in accordance with the value of the services performed after taking the contingency factor into account. Since the quantum of a settlement is not a decisive factor in determining the fee, the lawyer will probably have a greater incentive to act prudently and to accept a reasonable settlement offer rather than speculate on the possibility of a larger award at trial than would the lawyer who worked for a contingent fee that allowed him a percentage of the recovery. On the other hand, with the possibility that the representative plaintiff is indifferent to the interests of class members, there is a danger that the lawyer will effect a settlement at a stage in proceedings which is sufficiently advanced to ensure that the

court will award him a good fee but for a sum considerably less than the reasonable settlement value of the class claims, given the usual risks of litigation. The lawyer has but a tenuous responsibility to the class and is virtually free to settle their claims for less than their actual worth, that is, for less than what class members could properly expect to receive, assuming consultation with them was practicable.[14]

For the class lawyer the temptation to reach a compromise, knowing it to be inadequate, must be strong when the alternative might be no fee at all. A settlement for less than the value of the class claim will secure the lawyer his reward, and it will certainly suit the defendant, but the losers are the class members, who do not get the full compensation they deserve, and the members of the wider public, for whom the compromise has weakened the deterrent potential inherent in the action at its commencement.

Settlements for inadequate amounts of class actions brought under the combines legislation, made in effect between the lawyer for the class and the defendant, impair the respective compensatory, divesting and deterrent objectives of the litigation. To guard against such settlements the draft legislation provides that a class action compromise is not to be binding unless sanctioned by the court. If the court will not approve a settlement on the ground that the payment proposed is not sufficient, the action will proceed to trial unless the defendant raises the settlement offer to an amount which the court approves. Federal courts in the United States follow the same practice in class actions, as do courts in this country on the compromise of an action brought by or against an infant.[15] The procedure cannot guarantee to eliminate inadequate settlements entirely, but it is felt that as the lawyer will have to appear before the court and justify what is proposed, the procedure will keep such settlements to a minimum.

It will certainly be a safeguard against settlements that patently disregard the interest of class members.

Role of Class Action Lawyer

What role can be envisaged for the plaintiff's lawyer in a class action brought under the proposed legislation? Will remuneration by a contingent fee lead lawyers to perform an entrepreneurial function and, if so, is this necessarily to be condemned?

There are certain to be cases in which individual claims are substantial so that for the representative plaintiff a class action is worth the expenditure of time and effort. But it also can be expected that individual claims in other class actions will be quite small, so small indeed that separate actions would hardly be warranted. Then the lawyer rather than his client will have the greater investment in the litigation, with the prospective fee for the lawyer providing the true economic inducement for suing. This situation is really unavoidable if class actions are to be used to secure compensation for small claimants, but it has to be acknowledged that there is a risk that lawyers will exploit the procedure for their own advantage. Nonetheless, it is considered that with an informed and alert public, a vigilant judiciary and bar and the adoption of the safeguards proposed in the draft legislation, the danger of abuse will be reduced considerably, if not eliminated entirely.

Events should show that the inspiration for class actions will come from among public spirited individuals determined to get compensation for fellow victims of a combines violation and from lawyers who share the same ideals and are stimulated by the challenge of a new jurisprudence, their interest heightened no doubt by the possibility of earning a reasonable reward for their efforts. It is likely that in most cases the initiative to bring a class action will actually come from within the represented body itself, for instance, an association

of retail traders, or a consumer or other group representing members of the public that seeks to have the court determine a question of important public concern.

A Third Costs Alternative

The draft proposals that would introduce a class action procedure into the combines legislation will allow the lawyer for the plaintiff to act for a contingent fee. Lawyer and client could of course make the traditional arrangement that the lawyer should receive his fee win or lose. What the legislation will do is to offer the contingent fee as an alternative in those jurisdictions that at present do not allow the arrangement.

Just how vital to the success of the class action enforcement of the damages remedy is the contingent fee feature of the proposed scheme? The question needs to be addressed because with the opposition this aspect of the scheme is likely to arouse, particularly from law associations in provinces that do not allow the contingent fee,[16] it is conceivable that the feature will be omitted from any class action procedure that is introduced. The answer is that while the exclusion of the contingent fee proposal will have the effect of impairing the value of the class action, especially when individual claims are not substantial, it will not render it unworkable. The right to charge the plaintiff a contingent fee is not so essential to the efficacy of the procedure as the immunity of the plaintiff from responsibility for costs. It would destroy the utility of the class action in the case of small claims if the plaintiff had to face the ordinary costs liability.

If contingent fees in the strict technical sense in which the term has been employed so far were not to be allowed, it would still be open to plaintiff and lawyer to agree that the lawyer would only be remunerated if the action were successful, the lawyer

then taking as his fee the costs awarded against the defendant.[17] The lawyer's fee would be contingent in that payment depends on victory, but the court in assessing the costs to be paid by the defendant would ignore this factor. The lawyer would therefore not be compensated for assuming the risk of receiving nothing at all.

Whether lawyers will be found who are prepared to act on these terms must for the moment be uncertain. It will depend largely on how the lawyer rates the prospects of success and the time he can afford to spend in conducting the action. Also, a lawyer might be willing to act where otherwise he would not accept the risk if the claim was likely to attract attention and he felt that the litigation would generate favourable publicity for him.

The procedure for a preliminary court scrutiny of class action will keep out claims that lack foundation but it certainly does not assure success for those that pass through. In an action that runs full course, the plaintiff's lawyer who is not to get a fee unless the action succeeds will be kept in suspense until the time of judgment. While it would not be correct to assert that no lawyer would ever act for a contingent fee that promises the same reward as a fee payable in any event, it can safely be predicted that the prospective class action plaintiff will have better access to the services of a lawyer if the lawyer is offered the prospect of compensation for carrying the risks and hazards of the litigation.[18]

IX: FOOTNOTES

1. Deductions have been allowed for legal expenses incurred in defending a prosecution for a combines offence whether the defence was successful (M.N.R. v. L.D. Caulk Co. of Canada Ltd., (1952) Ex. C.R. 49) or not (Rolland Paper Co. Ltd. v. M.N.R., (1960) C.T.C. 158), on the principle that the expenses were paid to defend the company's way of doing business and to preserve the system that helped to produce its income. A deduction of the expenses of defending a civil action could be justified on the same principle, especially if the company had not previously been convicted for the business activity alleged in the damages claim to constitute an offence. But see, Rigmil Ltd. v. M.N.R., (1964), 18 D.T.C. 652. Legal expenses incurred in an unsuccessful action for damages are deductible if the proceeds of a successful action would have been taxable as income (No. 349 v. M.N.R. (1956) 10 D.T.C. 366).

2. 1974 Report of The Ontario Task Force on Legal Aid. Page 99

3. Business Corporations Act, R.S.O. 1970, c.53, s.99. See also, Companies Act. S.B.C. 1973, c.18, s.222; Canada Business Corporations Act, S.C. 1974-75, c.33, s.232.

4. Business Corporations Act, ibid, s.99(2).

5. Re Marc-Jay Investments Inc. (1974), 5 O.R. (2d) 235. Section 99(3) (c) requires the shareholder to demonstrate good faith.

6. Business Corporations Act, op.cit., note 3 s.99(4).

7. MacKinnon, op.cit., note 5, chapter 8, p.p. 4-5.

8. The general rule in England is that a contingent fee is unlawful as being contrary to public policy. The English Court of Appeal considered the rule recently in Wallersteiner v. Moir (No. 2) (1975) 1 All E.R. 849, in the context of an action by a minority shareholder of a company. The majority, the Master of the Rolls, Lord Denning, dissenting, held that no exception to the general rule could be created for this kind of action. Lord Denning considered that it was an appropriate situation to allow the plaintiff's lawyer to act for a contingent fee subject to suitable safeguards "for otherwise, in many cases, justice will not be done - and wrongdoers will get away with their spoils".

9. Williston, "The Contingent Fee in Canada", 6 Alberta Law Review 184 (1968).

10. Clayton Act, s.4.

11. See Chapter 6, note 2, in Wallersteiner v. Moir (No. 2) (1975) 1 All E.R. 849, at 861, Lord Denning, M.R., noted that the courts are in a position to control any abuses of the contingent fee and can limit the amount of the fee. In practice, the fee assessment would be made by a taxing officer of the court subject to an appeal to the court itself.

12. See Chapter 8, note 12.

13. See Dam, "Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest," 4 Journal of Legal Studies 47, 57 (1975).

14. Ibid, 59.

15. Also, in shareholders' derivative actions. See, for instance, Business Corporations Act, R.S.O. 1970, c.53, s.99(6).

16. Recently, the Law Society of Upper Canada authorized the Treasurer to appoint a special committee to consider whether lawyers should be permitted to charge contingent fees in Ontario (Communiqué, June 20, 1975).

17. See Chapter 8, section 3.

18. "The fee should be a generous sum - by a percentage or otherwise - so as to recompense the solicitor for his work - and also for the risk that he takes of getting nothing if he loses," Wallersteiner v. Moir (No. 2), (1975) 1 All E.R. 849 at 862, for Lord Denning, M.R.

X. PART V OFFENCES AND ANTICIPATED CLASS ACTION UTILITY

If Bill C-2 is enacted, section 31.1 of the Combines Investigation Act will confer a damages remedy for loss caused by "conduct that is contrary to any provision of Part V". So far this report has made only passing reference to particular Part V offences, mainly in connection with the ingredients of the damages cause of action and with some special characteristics of the class action procedure. This chapter makes a closer examination of the offences created by Part V. The survey is needed in order to identify in a more specific way than was done in the preceding pages the situations in which a class action could be expected to be valuable in actual practice. The inclusion of a class action procedure in the legislation can hardly be justified if its utility would only be marginal.

The survey examines the Part V provisions from two aspects. First, it attempts to point to the situations in which the commission of a Part V offence is likely to cause injury to individuals in numbers large enough to warrant representation on a class basis. A class action judgment, insofar as it binds members of the class, represents an exception to the general rule that no person is to be bound by a judgment in an action to which he is not a party either as plaintiff or defendant. Class action practice, embodied in a formal Rule of Court, by insisting that the persons represented be numerous,[1] has resolved the conflict between the imperative of this general rule and the exigencies of court administration that needs to substitute a single adjudication for a multitude of separate actions. The court's refusal to allow persons to be represented as a class when they are not numerous gives paramountcy to the general rule. When the membership is not large, if there is any litigation at all, the assumption is that the individuals interested in the controversy will be involved as actual parties because they will sue themselves, either in separate actions or as

co-plaintiffs joined in bringing a single action. The class action procedure that this report proposes reproduces the requirement that the individuals who are to form a class be numerous.

Following the identification of the situations that are likely to be suitable for class action presentation on account of the number of individuals affected, the survey examines the Part V offences from a second viewpoint. It inquires whether a class action in these situations would present management problems of such complexity that they would outweigh the gains derived from combining numerous separate claims for a single adjudication. The aggregation of claims strengthens the deterrent force of the damages remedy, but no less important, it raises the stakes in the controversy for plaintiff and lawyer, especially the lawyer, and supplies much of the impetus for suing. In many cases, without the fee incentive projected by the claims aggregation there would probably be no litigation at all, and no compensation for anyone. On the other hand, it can be questioned whether too high a price might not have to be paid to achieve compensation and deterrence, not only in the actual cost of administering a class action, but also in the distortion of the principles traditionally applied in assessing compensation.

The issue presents itself in the case of an action for a large class, the members of which are difficult to identify. Success in the action on questions common to the representative plaintiff and the class will have to be followed by individual proof on separate questions, for instance, reliance on a misleading advertisement or quantification of damage, if members of the class are to get compensation. However, the expense and effort of identifying class members, of notifying them of their right to participate in the successful outcome and then of processing their claims might not be defensible, particularly if individual claims are only small. Indeed, the very smallness of the individual claims will militate against widespread recovery as many of the class members

who do receive notice of the judgment simply will not take the trouble to claim the damages due to them.[2] This kind of apathy rather weakens whatever justification might have existed for embarking on the search for class members in the first place.

But to abandon the compensation objective as too costly to implement will produce the result that the wrongdoer is unjustly enriched and others are not deterred. The prevention of unjust enrichment and deterrence could then be achieved only if damages were assessed and awarded against the defendant as if they were to reach class members as compensation.

Making a wrongdoer pay damages which are not to be paid to the individuals for whose injury they were assesed would be a novel approach for damages awards. Under the orthodox rules that govern damages a wrongdoer will not be ordered to pay as compensation any greater sum than what will reach his victim, though income tax will reduce what the victim receives if the damages represent lost profits. The rule of common law as to the effect of death on a cause of action in tort illustrates the principle. Death extinguished the cause of action and so the defendant could not be made liable to pay damages to the estate of the victim. (Statute has changed the situation and now most causes of action in tort survive the death of the wrongdoer.) To calculate damages by reference only to the number of individuals injured, and without concern for whether any individuals actually receive damages, would represent quite a sweeping change in the rules governing damages liability. Also, it would generate a fund of money the greater part of which would not reach class members, leaving the court with the responsibility of disposing of the balances in some way.

Even supposing the courts were disposed to assess damages against a wrongdoer on the footing of the loss and injury inflicted, regardless of whether the victims were actually compensated, the assessment could not be made in every case. It is really an assessment of the damages sustained by the class as a whole, without the members being identified individually, and to assess damages on that basis requires certain information. The nature of the information will vary according to the Part V offence on which the particular damages claim is founded and, as the following pages will indicate, it will not always be readily available.

The offences for which damages in a class action might conveniently be assessed on a total class basis fall into two broad categories. The first consists of offences that relate to or affect the price that has to be paid for a product. (The Act defines a product as including an article and a service). These include collusive price fixing, bid-rigging, price discrimination, and price maintenance. The offences in the second category consist generally of practices that mislead or deceive purchasers of a product as to some quality which the product is supposed to have, for example, its performance or durability, and even its price. Misleading advertising, misrepresentations as to reasonable testing and publication of testimonials, multiple ticketing, advertising at a bargain price when stocks of the product are inadequate and sales above advertised price are examples.

As regards the method of damages computation, generally speaking, the offences in both categories share two characteristics. In most cases, the measure of damages for every offence is the difference between one set of figures and another, one figure being the price paid for the product in question by the individuals seeking compensation. The exceptions to this general proposition are cases where the price is not relevant in assessing loss, for instance, where the damages represent compensation for lost profits or for the destruction of a business consequent upon

the formation of a merger or monopoly which limits competition or operates to the detriment of the public, or where as a result of false and misleading advertising for a product competitors in the sale of the product have lost customers to the offending supplier. In the majority of situations, however, the general proposition holds good, namely, that whether the offence consists of an activity that relates to or affects the price of a product or of an activity that is calculated to deceive and mislead purchasers, the damage will be the difference between the price of the product and another figure. For offences in the first category, the other figure is the price that would have been paid for the product absent the price fixing conspiracy, bid-rigging, price discrimination or whatever other price related offence is the basis of the damages claim. In the case of damages claims for misleading advertising and other deceptive trade practices, the complaint of the purchaser is that the product without the qualities it was represented to have is worth less than a product which has those qualities. That lower value is the other figure for the purpose of the damage calculation. If it be assumed that the fair value of a product with the represented qualities is the price at which it was sold, the damage is the difference between the price and the lower value. (This perhaps oversimplifies the calculations since the price will not always be the decisive factor, for instance, if a product possessing the qualities in question would have been of greater value than the price or if the purchaser had sustained further consequential loss such as personal injury. The test, however, is sufficient for the purpose of demonstrating the problems in assessing damages on a total class basis).

Into whichever category the offence in question falls, assuming that the price of the product is the higher of the two figures, the damages recoverable for each product will be the difference between the price and the other figure. The other figure, the

price absent the offence in the first category and the actual value for the second, will not always be readily ascertainable. The inquiry as to a notional price, for instance, could be especially complicated as it postulates sales in a hypothetical market that was free of the restraints imposed by the violator, a situation which economists have difficulty in defining. Nevertheless, both the competitive price and the product value absent the represented qualities are matters which frequently will be capable of some rough demonstration and so the court will be able to make the necessary finding.

In a damages claim based on the commission of an offence within either category the injury alleged is referable to the sale of a product. The starting point, therefore, for assessing the damage to the class as a whole is the number of sales of the product during the time the violation took place. The next step in the calculation, however, reveals the critical difference between the two kinds of offences as regards the feasibility of assessing total damages. It concerns the counting of the number of class members, the individuals who would recover damages if they brought their own actions. A plaintiff relying on an offence falling within the first category only needs to prove that he purchased the product in question, assuming the extent of the price lift in consequence of the violation is established. The class therefore comprises all purchasers of the product, and the total damage sustained by the class can be determined simply by multiplying the number of products sold during the period of the violation by the price differential for each product.

By comparison, for claims following the commission of an offence in the second category, proof of purchase is not sufficient. Reliance is an ingredient of the cause of action. The plaintiff has to show that in buying the product he was misled or deceived by the advertisement or other practice of the defendant that constituted the offence.

The class therefore does not consist of all buyers of the product during the time the offence was committed but only of buyers who were induced to purchase by the defendant's unlawful activity. The factor of reliance complicates the calculation of total damages because supposing the damage recoverable for each product sold was known, the total damage could not be determined just by multiplying the damage amount by the number of sales during the relevant period. Total damages could not be arrived at by this method unless the court was prepared to assume that every purchaser had in fact been induced by the defendant's behaviour to buy the product. This assumption would exclude the possibility that anyone had bought the product independently of any claims made for it by the defendant, for instance, by purchasing on sight from a shop counter in ignorance of the defendant's advertisements or other selling techniques.

Some American Courts have presumed reliance, thus dispensing with the need for individual proof on the question, in situations where it was proper to infer that the misleading practice of the defendant had come to the notice of every buyer and that buyers had been induced thereby to make the purchase. This practice of presuming reliance when the facts warrant drawing that inference was discussed earlier in Chapter 4 in connection with the problem of administering a class action which raises separate questions that affect individual members of the class only. Unless courts in this country follow this approach whenever circumstances would allow the necessary inference to be drawn, it will not be possible to calculate the total liability of the defendant when reliance is an ingredient of the damages claim without individual proof on the question. Of course, it is an approach that only becomes relevant at the stage of assessing damages if the courts are prepared to calculate damages on a total class basis. Whether or not the courts will assess damages in this way is examined in the next chapter.

Two points that have been made earlier in the report should be emphasized. First, it needs to be remembered that the class action is simply a procedural device, a mechanism of convenience by which many claims against the same defendant that raise an identical question can be decided in the one action. For the action to succeed, the representive plaintiff must himself have a sound claim both in law and in fact. If the claim is deficient in either respect, it is not strengthened because it is presented for others as well as the plaintiff. In short, the representative capacity in which the plaintiff sues is irrelevant in determining the merits. That capacity is significant only in the event the plaintiff's claim is vindicated for then class members will benefit from the court findings on the questions common to all. Secondly, since the cause of action of the plaintiff is the core of any claims advanced for a class, the utility of a class action procedure in many of the situations to be examined will have to await the judicial resolution of a number of questions concerning the new damages cause of action under section 31.1 of the Act. These include the matter of causation, the connection between offence and the injury alleged. On the answer to this particular question depends the right of particular categories of individuals, for instance, indirect purchasers to sue for damages at all. Other matters involving the interpretation of section 31.1 that at present are uncertain will be mentioned in the context of specific Part V offences.

Part V Offences Analysed

The following are the offences created by Part V:

Conspiracy or Combination to Restrain or Injure Competition Unduly - Section 32.

In addition to making conspiracies and combinations to restrain or injure competition unduly an offence generally, section 32 prohibits the practice in a

number of specific instances, for example, in the facilities for transporting, producing or storing a product, or in the manufacture or production of a product.

Section 32 prohibits conspiracies and combinations over such a wide range of commercial activity it is not possible to identify all the situations that might give rise to a damages claim. Two things, however, are reasonably certain. First, generally speaking, whatever the precise practice that has restrained or injured competition in a product unduly, the plaintiff will be a purchaser of the product who complains that absent the unlawful conspiracy or combination he would have paid a lower price. Collusive price fixing is a good example. (A notable exception to this general proposition is the case of the business prevented from entering or forced out of a market by reason of an unlawful conspiracy or combination. The anticipated profits of market participation would then be the measure of damages, though over what period profits could be claimed would be a vexing question.)

Second, the individuals damaged by an unlawful conspiracy or combination would generally fall into two classes, individuals who have purchased directly from a conspirator and more remote purchasers. Direct purchasers would usually be in business themselves and have a continuing commercial relationship with the conspirator, for instance, as manufacturers using raw materials supplied by the defendant or as wholesale distributors of products manufactured by the defendant. If a direct purchaser has simply added the illegal overcharge to the price of the product at the next level in the chain of distribution, the court might hold that he has suffered no damage unless he can show that demand for the product was so inelastic sales would not have diminished even

if the price had been raised earlier.[3] It remains to be seen how Canadian courts will deal with this problem. Supposing, however, that the overcharge can be recovered, then the stake for an individual direct purchaser could well be so substantial that a class action is hardly needed; the distributor would sue whether or not he could also claim on behalf of other distributors similarily affected. Indeed, if a market comprises just a few direct purchasers, their numbers may not be sufficient to form a class for the purpose of a representative action. On the other hand, if distributors are sufficiently numerous and a class action is brought, it is not likely that notice to the class or the distribution of damages would cause any problems. If the plaintiff did not know the members of the class already, he could easily identify them after the action was commenced by independent inquiry or on discovery of the defendant's documents.

By comparison, an action on behalf of indirect purchasers could present problems of management, assuming the courts will allow such purchasers to recover damages. Members of the class will probably be quite numerous and not nearly so easy to identify as direct purchasers since whatever sales records exist would have been made by the intermediate distributor rather than by the defendant conspirator. Ordinarily, the only relevant information the defendant manufacturer could supply would be the total number of products that reached the market. With this information, damages could be calculated for the class of indirect purchasers as a whole but actual distribution to members could not be achieved without going through the process of giving notice to the class by advertisement and then examining individually the claims of persons who responded.

Bid-Rigging - Section 32.2

This section makes it an offence to be a party to a collusive agreement or arrangement in relation

to a bid or tender when the fact of the agreement or arrangement is not made known to the person calling for or requesting the bids or tenders at or before the time the bid or tender is made.

The only individual affected directly by the offence would be the party accepting the collusive bid or tender and a class action would not be needed. The damage would be the difference between the price actually paid for the product supplied and the price that would have been paid had there been no collusion. Assuming that purchasers from the party accepting the bid or tender were allowed to recover for the illegal overcharge, a class action would be a suitable procedure for adjudicating the claims of all, though it might present the same administrative problems as those discussed for class actions brought by indirect purchasers who alleged an offence against section 32.

Conspiracy Relating To Professional Sport - Section 32.3

This section prohibits conspiracies or combinations to limit unreasonably the opportunities for persons to compete in professional sport.

A class action would be appropriate if a large number of competitors were injured as a result of the conspiracy, though since the offence relates to professional players the financial stakes would normally be so substantial that an individual would sue whether a class action could be brought or not. If a class action based on this offence were commenced, there ought not to be any difficulties of management as it should be easy to identify class members.

Formation of a Merger or Monopoly - Section 33

The section makes it an offence for a person to be a party to or to knowingly assist in, or in the formation of, a merger or monopoly which limits

competition or operates to the detriment of the public.

The regulation of merger or monopoly is highly technical and perhaps the most difficult area of the competition law to administer, and it is not possible to identify in advance specific situations in which damage will result from an illegal merger or monopoly, or the kinds of damages claims for which a class action would be appropriate. Class claims for loss of profits for exclusion from the market consequent upon a merger or monopoly situation can be disregarded as so few individuals would have suffered this kind of damage and individual losses would be so high that a class action would have no place.

A class action procedure could prove valuable, however, where the damage alleged consisted of a price increment resulting from the formation of a merger or monopoly. To assess the utility of a class action in this context there is the same distinction between direct purchasers of the product in question and purchasers not in privity with the defendant as regards standing to sue and the management of a class action that exists for the conspiracy offence under section 32.

Pricing Offences - Section 34

This section specifically prohibits the following pricing practices:

(a) The practice of granting a price concession or other advantage to a purchaser of an article, not made available to competitors of the purchaser who purchased articles of like quality and quantity at or about the same time. In short, price discrimination. (Section 35 prohibits discriminatory advertising allowances on the sale of a product. The practice is essentially the same as price discrimination and it will not be dealt with separately).

(b) Price discrimination according to selected geographical areas of Canada when that practice does or tends to lessen competition or eliminate a competitor in that area;

(c) Selling products at prices unreasonably low when that practice does or may lessen competition or eliminate a competitor.

Consumers will have no grievance if concessions or reductions in price made in contravention of section 34 are passed on to them. (Consumers may benefit initially, but over the long term the practice may lead to increased prices through the reduction or elimination of competition). The immediate injury from these practices is sustained by business and business enterprises rather than consumers will be the plaintiffs in any damages actions that are brought on the basis of the offence.

With offence (a), price discrimination, the aggrieved party will be the purchaser who is discriminated against as compared with competitors who deal with the offending supplier. In the case of offences (b) and (c), the business that commits the offence is not a supplier of products to the complaining party but is actually in competition with it. With these last two offences the pricing activities of the supplier would normally be directed at a single competitor or at no more than a few competitors. If a single competitor was the victim, he could of course sue for no one but himself. Whether a class action could be justified in the case of pricing practices that affect several competitors depends on the number involved. There is probably greater scope for class actions in the case of offence (a), and an illustration of the application of the procedure for this type of violation was given earlier in Chapter 4.

A class action based on an offence against section 34 would present no substantial management problems as the class members would normally be easily identifiable. Individual damage assessment would take rather more time than in cases such as illegal price fixing, but the advantage of having the common question of price discrimination or predatory pricing decided in the same action would more than compensate for this.

Misleading Advertising - Section 36

Section 36(1)(a) contains a general prohibition of representations to the public about a product that are false or misleading in a material respect, while the subsections that follow prohibit specific kinds of false representations. Reliance on the representation is an element of the damage cause of action founded on the commission of an offence against section 36. As explained previously, this means that the total damage inflicted by the violation cannot be determined simply by multiplying the amount of damage sustained on the sale of each product by the number of products sold during the period the offence was committed, unless from all the circumstances it is reasonable to infer that in fact every purchaser was induced by the defendant's unlawful conduct or activity to make the purchase, and the court is prepared to draw that conclusion. If the court does not assess damages on the basis of the loss to the class as a whole, either because it rejects this approach to damage assessment or, while accepting the approach, it cannot make the calculation for lack of information, the liability of the defendant will be restricted to meeting the claims of individual class members who have established their entitlement, that is, to individuals who can show they were misled.

Subsection (1)(b) prohibits the making of a representation as to the performance of a product that is not based on adequate and proper testing. If the product performs as represented, there is no damage, whether the representation was based on adequate and proper testing or not. On the other hand, if the product does not so perform, that will be the complaint of the purchaser rather than the absence of testing and his damages complaint will be based not on subsection (1)(b) but subsection (1)(a), which contains the general prohibition against representations that are false or misleading in a material respect.

By subsection (1)(c) it is an offence to make a representation in the form of a warranty or guarantee of a product or a promise to replace, maintain or repair an article which is materially misleading or if there is no reasonable prospect that it will be carried out. A purchaser who relied on the representation would probably be entitled to damages if it could be proved that the value of the product or article was less than what its value would have been if the purported warranty, guarantee or promise was genuine. Competitors of the offending business might also be allowed to recover damages if they could show that they have been injured as a result of the unfair trading advantage gained from the misleading representation.

Finally, subsection (1)(d) prohibits a materially misleading representation as to the price at which a product has been, is or will be ordinarily sold. This offence is not of much practical significance as regards the damages remedy for the reason that a purchaser relying on the representation would usually not be able to prove any damage. The following example demonstrates the point. Suppose a retailer sells an article for $10.00 representing that his usual price or that of his competitor is $15.00 when in fact it is $10.00. A person who purchased in reliance on the representation would not have been damaged, unless the law allows compensation for the lost expectation of a $5.00 gain, which is doubtful.

Representation as to Testing and Publication of Testimonials - Section 36.1

Under this section it is an offence for a person to make for promotional purposes a representation that a test of performance of a product has been made or to publish a testimonial with respect to the product except upon certain specified conditions. The conditions seem designed to provide some assurance that the test or testimonial was actually made or given before the representation was made. Non-compliance with the conditions would amount to an

offence but it is difficult to conceive of any situation in which damage would result.

Multiple-Ticketing - Section 36.2

This section prohibits a sale of a product at a price that exceeds the lowest of two or more prices with which the product is ticketed or marked.

This section was enacted to protect the consumers from the practice of supermarket operators and other retailers during periods of rapidly rising prices in marking products on the shelf at a price higher than the price the product originally bore. (Presumbably, the vice of the practice is that it yields retailers additional profits that are not earned, yet ironically no offence is committed if the retailer simply removes the original lower price). Only purchasers who paid the higher price would be damaged and the individual loss would usually be just a few cents. No record would exist of sales in breach of the provision and damages calculation on a class as a whole basis would not be possible.

Pyramid Selling - Section 36.3

It is an offence under this section to induce or invite another person to participate in a scheme of pyramid selling as defined in the section.

It is questionable whether damages could ever be recovered for a violation of this provision. A participant would suffer damage if the scheme collapsed and his investment were lost, but it is the invitation to participate and not the collapse of the scheme that constitutes the offence. It is arguable, therefore, that for the purpose of section 31.1 of the Act, the damages remedy provision, the proximate cause of the loss is not the invitation, the actual offence, but rather the subsequent break-down of the scheme. However, supposing damages were recoverable, an action might well not be worthwhile

since schemes of this kind are often the handiwork of fly-by-night operators who either have disappeared or are insolvent by the time their victims look for redress. Further, a class action could not be brought unless participants had joined the scheme in response to invitations that were made by the promoter in substantially the same terms. The necessary common interest would be missing if the defendant had offered different inducements to different people.

Referral Selling - Section 36.4

Inducements or invitations to participate in a scheme of referral selling, as defined, are also prohibited.

The offence is committed by A if A sells or leases a product to B representing that B will be allowed a rebate or commission if A sells or leases the same or another product to other persons whose names are supplied B.

B will sustain loss if sales or leases are made to persons to whom A had been referred by B and A did not allow the rebate or commission. However, it is doubtful whether the commission of the offence, which consists of offering an inducement or making an invitation to join the scheme, is the proximate cause of the loss for the purpose of the damages cause of action. Rather, it is arguable that the proximate cause is the failure of the defendant to do what he represented he would do, which is not an offence.

Assuming damages can be recovered in respect of the referral selling offence, the comments in relation to pyramid selling concerning the prospects of getting satisfaction from the defendant and the requirement that for a class action the inducements or invitations to participate should have been made in substantially identical terms apply with equal force.

Bait and Switch Selling - Section 37

The offence consists essentially of advertising a product at a bargain price when the product is not available in reasonable quantities. The prohibition strikes at the practice whereby a customer is lured to a store by the prospect of buying, at a bargain price, a product which the merchant does not have at all or has in token quantities only, in the hope of persuading the customer to buy a product at a higher price.[4]

A customer attracted into a store by an advertisement for a bargain-priced product who finds that the product is not available at the bargain price would take one of the following courses:

(a) buy the product or its equivalent in another brand elsewhere at the same price as the bargain price,

(b) buy the product or its equivalent in another brand either from the defendant or elsewhere at a higher price,

(c) not buy the product at all.

The purchaser in (a) suffers no damage, apart from incurring the expense of getting to another seller. The purchaser in (b) has been damaged, while the purchaser in (c) has lost the opportunity to buy the product at the lower price but has not parted with his money, though possibly he incurred expense in attending the defendant's store, and possibly he could recover damages for the lost expectation of a bargain.

Purchasers in category (b) would have a common interest on the question of publication of the advertisement for the sale of the product at a bargain price sufficient to constitute them a class. The total damage to the class could not be calculated without individual proof because until class members actually come forward there would be no means of

knowing what number of persons had been misled by the advertisement and had then bought at a higher price nor what additional price they had paid.

Selling Above Advertised Price - Section 37

This section prohibits the selling of a product above the advertised price. It is directed at a practice which is similar to bait and switch selling.

If the offence is characterized simply as selling above a certain price, inducement would not be material and any person who paid the higher price could recover the excess above the advertised price as damages whether he had read the advertisement for the product or not. The section, however, defines the offence by reference to an advertised price, which suggests that inducement is an element of damages claim that is based on a violation. On this view, recoverable damage is not sustained by a purchaser unless he can show that after reading the advertisement and expecting to buy at the advertised price, he found that the actual price was higher and bought at that price.

The number of individuals who bought at the higher price would no doubt be sufficient for class action purposes, though in most cases claims would be small. Also, it is not likely that records were kept from which the purchasers could be identified. However, if the number of sales of the product at the unlawful price was known, damages for the class as a whole could be assessed provided inducement were not an element of the damages remedy. Whether or not inducement must be proved will have to await a judicial interpretation of the section.

Promotion Contest - Section 37.2

This section stipulates a number of conditions for the regulation of contests to promote a product. These include provisions which require the advertiser to give certain information that affects

materially the chances of winning and which prescribe the methods of selecting prize winners. It is difficult to visualize any situation in which damage would result from a contravention of these provisions.

The breach of another provision, subsection (1)(b), however, might cause damage. The subsection provides that distribution of the prizes is not to be delayed unduly. For this particular offence the damages remedy to be created by section 31.1 is probably superfluous as the subsection simply recites what would already be a contractual term between contestant and advertiser.

Price Maintenance - Section 38

The section creates three offences, all of which relate to attempts to maintain or influence upwards the price of a product. In effect, the section prohibits the following practices:

(a) Attempts by a producer or supplier of a product to influence upwards the price at which the product is sold by a distributor (s.38(1)(a)).

(b) the refusal of a producer or supplier of a product to sell to a distributor because of the low pricing policy of the distributor (s.38(1)(b)).

(c) attempts by the competitor of a distributor, as a condition of doing business with a supplier, to induce the supplier to refuse to supply a product to the distributor because of the low pricing policy of the distributor (s.38(6)).

In the case of offence (a) the insistence on price maintenance could conceivably damage a distributor if he could prove that his profits on increased sales resulting from reduced prices would be higher than his present profits. His claim would be for lost anticipated profits. There would certainly be scope for a class action in this situation if a sufficient number of distributors

were affected adversely by the practice and since the distributors could be identified easily there ought to be no problems in administering the action.

Purchasers from the distributor might be allowed to claim as damages from the offending manufacturer or supplier the difference between the actual price which they paid for the product and the lower price at which the distributor would have sold had he been free to do so, assuming the product was not available at a lower price elsewhere at the time. The purchasers could sue on a class basis but since individual purchasers would not readily be identifiable management difficulties of the kind described already would no doubt be encountered. On the other hand, it would be possible to calculate the damage sustained by the class as a whole simply by multiplying the price differential by the number of products sold by the immediate distributor.

The distributor victim of offence (b) could recover damages from the producer for the profits lost on sales of the product which the distributor was not able to make because of the producer's refusal to supply the product to him. The distributor is subject to a duty to mitigate the loss by seeking alternative supplies. If a number of distributors were refused supplies in accordance with a deliberate policy followed by the producer, a common question would exist between distributors and producer, and a class action could be brought provided the distributors were sufficiently numerous. Class members would be readily identifiable and the action would probably present no problems of management.

The third offence, numbered (c) above, is established by section 38(6). The section prohibits an attempt by the competitor of a distributor to induce a refusal to supply on the ground of the low

pricing policy of the distributor. If the attempt succeeds, then the distributor has violated the provisions of section 38(1)(b), and will be liable in damages in accordance with the explanation above. It is not clear whether the competitor who had actually influenced the producer to withhold supplies would be guilty of an offence and hence liable to damages when section 38(6) prohibits not the completed act, but merely an attempt.

The foregoing survey shows that in many situations the commission of a Part V offence will have caused damage to individuals in numbers sufficient to warrant a class action being brought. The survey also discloses that it is not possible to judge the full potential of the class action procedure until the courts have resolved a number of questions that at present are not clear. Among the questions is the matter of standing to sue, and the answer will determine whether remote purchasers from an anti-competition offender will be able to recover damages or whether the remedy will be available only to persons who purchased directly. Another question concerns the precise composition of the damages cause of action for some of the Part V offences. For instance, must the plaintiff show reliance in a claim based upon a sale above advertised price made in breach of section 37? Finally, there is the question of total damage assessment. Will the courts assess the damage liability of the defendant by reference to the loss sustained by the class as a whole, assuming the amount can be fixed without individual participation by class members, or will the defendant's liability be restricted to class members who establish their entitlement to share in the recovery? This last question is discussed in the next chapter.

X: FOOTNOTES

1. The Rule does not define "numerous", and the few reported decisions on the question do not provide much guidance. In the United States a four-member class was held to be not numerous enough and in another case as few as 18 members were found to be sufficient. See Donelan, "Prerequisites to a Class Action Under New Rule 23", 10 Boston College Industry & Commerce Law Review 527 at 530 (1969).

2. E.g., in Cherner v. Transitron Electronic Corp., 201 F. Supp. 934 (1962), a securities action that resulted in a $5.3 million settlement fund, some 150,000 claims were mailed to class members, Transitron shareholders who had purchased stock before February 20, 1962. Of these, 50,000 claims were returned, and 33,000 were ultimately approved.

3. On this question the United States Supreme Court in Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 at 493 (note) (1967), commented: "The mere fact that a price rise followed an unlawful cost increase does not show that the sufferer of the cost increase was undamaged. His customers may have been ripe for his price rise earlier; if a cost rise is merely the occasion for a price increase a businessman could have imposed absent the rise in his costs, the fact that he was earlier not enjoying the benefits of the higher price should not permit the supplier who charges an unlawful price to take those benefits from him without being liable for damages. This statement merely recognizes the usual principle that the possessor of a right can recover for its unlawful deprivation whether or not he was previously exercising it."

4. Consumer and Corporate Affairs, Proposals for a New Competition Policy for Canada, 79 (1973); Note, "State Control of Bait Advertising" 69 Yale Law Journal 830, 832 (1960).

XI. UNMANAGEABILITY AND TOTAL DAMAGE ASSESSMENT

The Management Problem

The review in the last chapter of the different offences created by Part V of the Combines Investigation Act disclosed that in most cases the commission of an offence could cause damage for which compensation would be recoverable in an action brought under section 31.1 of the Act.[1] The review also showed that in some situations probably no more than a few individuals would be injured by the violation while in others the amount of damage inflicted would be quite substantial, so that in the one case the victims of the offence might not be sufficiently numerous to justify a class action being brought and in the other those affected might well bring an action whether or not they could also sue for a class.

Occupying the middle ground is the situation of injured persons who constitute a class of considerable size and whose separate claims are not so substantial that individuals would be likely to sue. A good example is a group of several hundred purchasers of new refrigerators each of whom has been overcharged $50 on the product as a result of collusive price fixing among manufacturers or distributors. Another example is a similar sized group of refrigerator purchasers each of whom has suffered $75 damages because the manufacturer's representation that the product was frost free, and on which they all relied in buying, was false. A class action in these situations would achieve compensation and at the same time have some deterrent value as class members should not be difficult to identify and the damage amounts are sufficiently large for individual members to come forward to establish their entitlement.

Under other conditions, however, a class action for damages will raise such difficult problems of management that it must seriously be questioned

whether the expense and effort of endeavouring to overcome them does not outweigh whatever advantages are to be gained from uniting many claims against the defendant in the same action. The objective is to get compensation to all the members of the class but this will be difficult when the class is large, the members cannot be readily identified and the size of individual claims is small. Provided no expense were spared, it would certainly be possible to locate most of the class members and pay the damages to them, but when the expense will be borne by the defendant and individuals, recoveries are so small there is a point when the price for attempting to implement the various class action objectives becomes too high. Exactly when a class action ceases to be justifiable will depend on the facts of the particular case and to a large degree be a matter for individual judgment, a question on which opinions may reasonably differ. The range of factors that potentially are relevant in reaching a decision is so wide, and the emphasis upon them can shift so much, it is really not possible to identify in advance the situations when a class action should or should not be allowed. One solution would be not to permit class actions to be brought at all, and simply not introduce the procedure into the legislation. But this would seriously jeopardize the value of the damages remedy in quite a number of situations where the class action could work without much difficulty.

Excluded When Unmanageable

This report advocates the inclusion of a class action procedure in the Combines Investigation Act, though it recognizes that some actions would create management problems of such complexity the proceedings ought not to be allowed to proceed beyond the initial stages. It is therefore proposed that the manageability question be dealt with at the very outset of the action in order to save the parties the expense of preparing for the trial of an action which ultimately the court

refuses to hear and determine. An earlier chapter of the report has described the examination of the bona fides of the plaintiff and of the prima facie merits of his claim which the court will be required to make soon after a class action is commenced. This would also be a convenient time to consider the manageability point and the report therefore recommends that the court should then be obliged to determine whether a class action is superior to other methods for the fair and efficient adjudication of the controversy, and among the factors which the court is to take into account are any difficulties likely to be encountered in administering relief to the members of the class by reason of the size of individual claims and the number of class members.

A ruling on the manageability question involves essentially an exercise of discretion and it is not practicable to prescribe in advance what the court should decide in a particular situation. However, in reaching a conclusion the court would be expected to strike a fair balance between the competing objectives of keeping the burden and expense of administering relief under reasonable restraint and of giving effect to the damages remedy.

Large class size and smallness of individual claims are not factors that should lead the court automatically to halt a class action as unmanageable. It needs to be remembered that in contrast to the situation in the United States, individual notice of the commencement of an action to class members who are identifiable is not mandated under class action practice in Canada nor will it be required under the class action scheme proposed for the combines legislation. In this country notice is not usually given until after a judgment has been pronounced for the class on the common questions, the object of the notice then being to inform class members of their right to participate in the recovery. But, as the following illustrations show, even notice after judgment can sometimes be dispensed with.

Whether a record exists of the names and addresses of class members or whether the members are in a continuing business relationship with the defendant are important considerations in determining the question of manageability. For instance, if a reliable record were available of the purchasers who comprise the class in a price-fixing case, no individual proof would be necessary and a cheque for the amount of the illegal overcharge could simply be mailed to each purchaser. Again, if class members were on-going customers of the defendant, for example, charge-account customers of a retail department store or customers of a public utility as, for instance, the customers of domestic electricity from British Columbia Hydro in Chastain,[2] even actual payment would not be needed. It would be sufficient if the defendant credited the customer's account with the amount due. The small size of individual claims is scarcely material if distribution of the damages to class members can readily be carried out by techniques of this kind.

Fluid Class Recovery

This report proposes that the court should be authorized to terminate a class action if it concludes that the proceeding is not appropriate because of the difficulties likely to be encountered in administering relief to members of the class by reason of the size of their individual claims and the number of class members. But while a court may stop a class action on this ground, it would not be obliged to do so if information were available from which the court could assess without individual proof by class members the amount of damage inflicted on the class as a whole, and the court was prepared to make the defendant liable for that amount. Assessing the total damage to the class has been mentioned already. The amount is determined by multiplying the number of members of the class by the damage sustained by each member, supposing all were damaged in the same amount or that the average loss could be calculated. Under

this approach to damage assessment there are no difficulties in administering relief to members of the class since individual recovery is not material in quantifying the defendant's liability. Compensation is by no means disregarded as distribution of the award to individual class members would take place as far as practicable, but it is certainly subsidiary to the objectives of preventing unjust enrichment and deterrence.

The rules that govern the measurement of compensation for loss or injury are almost entirely a development of the common law, and legislative intervention has been infrequent. The draft legislation which concludes the report maintains that tradition. It does not deal at all with how the courts are to assess damages in a class action brought for a combines violation. There is therefore no bar to an innovative court assessing damages on a class as a whole basis. A court prepared to take this approach to calculating damages if subsequently at trial the class plaintiff succeeded on the common question of liability would at the stage of the preliminary inquiry into manageability be much more disposed to allow the class action to continue than would a court that took the orthodox view of damage assessment.

Though the proposed class action legislation does not direct the court to assess damages for the class as a whole so as to make a class action administratively feasible, the report nevertheless favours this approach when circumstances are appropriate, and for the reasons developed in the pages following. Courts will be left with a discretion whether to assess damages this way or not. It needs to be understood, however, that total class damage assessment has a limited potential, and also that when applied it raises its own special problem.

A court that was prepared to assess the total damage would not terminate a class action at the

preliminary stage on the ground only that difficulties would be encountered in administering relief to class members. It would do so, however, if those difficulties were present and total damage assessment could not be invoked to overcome them. The damage to the class as a whole can only be determined without individual participation by class members when the aggregated damage equals the multiple of the number of products sold and the average damage referable to each product, as in collusive price-fixing. Total damages cannot be calculated by this formula when reliance on the defendant's misleading advertisement or other prohibited trade practice is an element of the cause of action and the court either will not or is not able to presume that every purchaser had been induced by the defendant to buy.

Also, since it is assumed when damages are assessed for the class as a whole that few class members will actually be paid compensation, a large part of the money paid by the defendant will remain in court. It would clearly defeat the object of total damage assessment if the residue were to be returned to the defendant and so the court is left with the problem of disposing of the balance. Some courts in the United States have allowed damages to be awarded for the class as a whole and it is instructive to examine what they have done with the damages fund when the whole or a substantial part of it could not be distributed to individual class members. The term fluid class recovery is used in the United States to describe the total assessment approach.

Disposing of Residue

Fluid class recovery is premised on the expectation that a large number of class members will not claim the damages assessed for the class as a whole, thus leaving a substantial part of the award undisposed of. In dealing with this residue, courts in the United States have worked by analogy with the cy près doctrine applied to charitable gifts in the law of

trusts. If a donor has clearly expressed his intention to benefit charity, the gift will not be allowed to fail because the mode, if specified, cannot be executed, but the law will substitute another mode as near as possible to the mode specified. The following comment from an advocate of the fluid class recovery theory explains the application of the cy près approach to damage distribution:

> ...where wrongs are done to masses of people who for one or another reason are unable or unwilling to present their claims, nonetheless the wrongdoer must be made to disgorge. Permitting the wrongdoer...to retain the fruits of (his) wrong would encourage preying on the public. How then compel a defendant to pay in spite of the fact that there is no one to claim the payment?...If precise restitution to the victims is impracticable or impossible, the judges reason, then the recovery should go to some broad category which, by and large, includes the aggrieved members of the class. In this fashion, even if the injured person is not avenged, at least the wrongdoer is deterred. Thus they implement the declared purpose of Rule 23 (the Federal class action rule): to discourage wrongdoing.[3]

In the case of Eisen v. Carlisle & Jacquelin, mentioned in Chapter 7 in connection with the subject of notice to the class, the trial court cited three cases as "respectable precedent" for fluid class recovery.[4] Though the cases were distinguished on appeal,[5] the Second Circuit holding that they provided no precedent for fluid class assessment under Federal Rule of Civil Procedure 23, they do demonstrate the concept in operation. The first case, Bebchick v. Public Utilities Commission,[6]

was not technically a class action and Rule 23 was not in question, but nevertheless the fluid class principle was applied. The transit company of the District of Columbia was found to have increased bus fares without authority, but the fares could not be refunded as those who paid the fares could not be identified. The court therefore directed that the amount of the illegally charged fares be set up in the books of the transit company to be used "to benefit bus-riders as a class in pending or future rate proceedings." In State of West Virginia v. Pfizer Co.,[7] a consolidation of some 60 actions known as the Drug Cases, various states and municipalities recovered $100 million from a number of pharmaceutical companies for violations of the anti-trust laws relating to price-fixing. Of the recovery, $37 million was made available to meet claims of some estimated 150 million consumers, plus attorney's fees and costs, with the balance being paid to the states and municipalities represented to be used for public health facilities. However, as noted by the appeal court in Eisen, the court fixed the damages on a fluid class basis following a compromise of the proceedings and not by determination at a trial of the action. Finally, in Daar v. Yellow Cab Co.,[8] the class alleged overcharges in taxi fares. On demurrer, the California Supreme Court upheld the class action. The court evidently anticipated that individuals who had been damaged by the alleged overcharge would ultimately have to prove their separate claim, but this did not become necessary as the action was later settled, the defendant agreeing to reduce future taxi fares until the past overcharges were repaid to the riding public. The Second Circuit in Eisen distinguished Daar on several grounds, one being that the state class action statute in Daar was in very different terms from Federal Rule 23.

Criticism of Fluid Class Recovery

Critics of fluid class recovery correctly point out that it differs from traditional damages theory in two respects. First, it is assumed that most of the victims of the defendant's illegality will not get compensation, at least not directly. Second, a distribution of the damages residue by the kind of cy près analogy applied in cases such as Bebchick and Daar will benefit individuals who were not injured by the defendant's wrongdoing and did not belong to the plaintiff class.

However, by focusing on the beneficiaries, the traditionalist criticism of fluid class assessment disregards the position of the defendant, and also the deterrent potential of the class action device. Fluid class recovery certainly does imply the conferring of benefits on individuals who were not injured by the defendant's misconduct, and possibly to the exclusion of class members who were. However, in a real sense the award does not affect the substantive obligations of the defendant. It is not a penalty because the measure of the recovery is the total amount of the damage inflicted by the defendant's wrongdoing. As the amount of the award is identical to what the defendant would pay if each class member came forward and proved his loss the defendant ought not to be heard to plead that because the victims of his judicially determined wrongdoing have not made a claim he should be free of financial responsibility. As to the objection that the beneficiaries of the unclaimed residue will include individuals who did not belong to the class, one American commentator has accurately observed, "The windfall that does occur should be viewed as an unavoidable byproduct of the basic relief; it should no more make such relief improper than does the fact that third parties may benefit from injunctions make that relief improper. More generally, so long as defendants' rights are not abridged, it is unclear what policy is served by striking down a remedy

which may be the only effective way to vindicate the rights of plaintiff class members, simply because it also benefits third parties."[9]

On appeal in Eisen, the Second Circuit held against fluid class recovery in the strongest language: "...even if amended Rule 23 could be read so as to permit any such fantastic procedure, the courts would have to reject it as an unconstitutional violation of the requirement of due process of law. But as it now reads, amended Rule 23 comtemplates and provides for no such procedure. Nor can amended Rule 23 be construed or interpreted in such fashion as to permit such procedure. We hold the fluid recovery concept and practice to be illegal, inadmissible as a solution of the manageability problems of class actions and wholly improper."[10] The Second Circuit dismissed the action without prejudice on its continuance insofar as the plaintiff asserted an individual claim against the defendant. On appeal the Supreme Court did not rule on the fluid class theory.[11] The Court agreed with the Second Circuit that the action could not be brought for the class as originally constituted, and upheld the dismissal, but the Court noted that the dismissal was without prejudice to the plaintiff redefining the class. It therefore vacated the Second Circuit's judgment of dismissal and remanded the cause for further proceedings consistent with the opinion. Contrary to what was reported in the press at the time,[12] the Supreme Court decision did not end the Eisen action. Though unsuccessful on the appeal, Eisen was left free to continue the proceedings provided he narrowed the size of the class to within manageable limits.

The Supreme Court's disposition in Eisen did not carry an endorsement of the Second Circuit's holding on fluid recovery, and the question of the validity of the concept still awaits the judgment of the Court. If the Court eventually rules the theory invalid, a legislative solution to the problem of calculating and distributing damages for

a large class may be attempted.[13]

Director of Investigation and Research

This report favours the imposition of liability for the damage to the class as a whole where the damage amount can be calculated with reasonable accuracy without the participation of individual class members and where in fact the members or substantial numbers of them do not participate in the recovery. A successful class action has the potential for bringing compensation to every person injured by a combines offence, but the prevention of unjust enrichment and deterrence are two no less important objectives. Where the entire damage is readily ascertainable, these objectives can be achieved regardless of whether individual class members receive compensation simply by making the defendant pay the total amount.

The draft legislative proposals that are contained in the final chapter of the report do not direct the court to award total damages against the defendant whenever the amount can be determined without the involvement of individual class members. On the other hand, there is nothing in the legislation to prevent the court assessing the defendant's liability in this manner in the appropriate case. The matter is left to the court to decide. What the legislation does propose, however, is a procedure for achieving the non-compensatory objectives of a class action in situations where total damage assessment was practicable but the court nevertheless ruled the action administratively unmanageable and refused the plaintiff leave to continue with the representative claim. This could result if the court had rejected the theory of total damage assessment or if, while accepting it, had concluded that it would not work in the particular case because of the difficulties of devising a suitable scheme for disposing of the unclaimed residue of the damage award. The report proposes that if damages

as a whole can be determined and a class action is dismissed as unmanageable, the Director of Investigation and Research ought to be allowed to bring an action to recover the damages, the amount to be paid into the Consolidated Revenue Fund. To succeed, the Director would have to establish that the defendant had committed the Part V offence alleged in the original action and also consequential damage to individuals. With payment of the damages to be made into the public revenue, the proposal abandons the goal of compensation, but the objectives of preventing unjust enrichment are preserved.

The Director is given a discretion whether to bring an action or not, and it is contemplated that among the factors he would consider is the outcome of any criminal prosecution for the offence. If the defendant had been convicted and fined a substantial sum, the Director might well conclude that the penalty was sufficient to prevent unjust enrichment and to deter others, and hence decide not to sue himself.

There is some precedent in other jurisdictions for the proposal that a representative of the public should be empowered to bring suit for individuals who have been injured by anticompetitive behaviour and other prohibited kinds of business practice.

In British Columbia the Director of Trade Practices appointed under the Trade Practices Act 1974 may bring an action on behalf of, and in the name of, a consumer or consumers against a supplier to enforce or protect the rights of the consumer respecting a contravention of rights arising under the Act.[14] The Director may also obtain on behalf of consumers a declaration and injunction against a supplier who has engaged in a deceptive or unconscionable practice in respect of a consumer transaction, and an order that the supplier restore to consumers any money or property that may have been acquired by reason of the practice.[15] A similar scheme has operated in New York City since 1969. Under the city ordinance entitled the Consumer Protection Law of 1969, the New York City Department of Consumer Affairs is

authorized to sue an offending business on behalf of all consumers victimized by any large-scale wrongdoing, to obtain a gross recovery, and then to distribute the proceeds to the victims individually.[16] Finally, in Saskatchewan, pursuant to the Department of Consumers Affairs Act 1972, the Attorney General may sue for the benefit of any persons who could have brought an action on their own behalf in respect of loss suffered by reason of the commission of an offence against the Act or any of the Acts that are administered by the Minister of Consumer Affairs or any regulations made under those Acts.[17]

All these schemes contemplate that where an action brought by the public official is successful the proceeds should in some way be distributed to the individuals in respect to whose loss the action was brought. By contrast, under the procedure proposed in this report any damages awarded against the defendant in an action brought by the Director of Investigation and Research are to be paid into Consolidated Revenue Fund. In this regard a scheme that is currently being considered in the United States resembles the report's proposal far more closely than do the schemes outlined in the preceding paragraph. A bill has been introduced in Congress to amend the Clayton Act to allow the attorney general of a State to bring an action to secure monetary relief in respect of any damage sustained by reason of a violation of the antitrust laws.[18]

XI: FOOTNOTES

1. The exceptions would appear to be: misrepresentation as to adequate testing (s.36(1)(b)); regulation of representation as to testing and publication of testimonials (s.36.1); pyramid selling (s.36.3); referral selling (s.36.4); promotional contests (s.37.2).

2. See Chapter 2, section 1.

3. Pomerantz, "New Development in Class Actions - Has Their Death Knell Been Sounded?", 25 Business Lawyer 1259, 1260 (1970).

4. 52 F.R.D. 253, 264 (S.D.N.Y. 1971).

5. 479 F.2d 1005 (1973), aff'd 94 S. Ct. 2140 (1974).

6. 318 F. 2d 187 (1963).

7. 314 F. Supp. 710 (1970), aff'd 440 F. 2d 1079 (1971).

8. 63 Cal. Rptr. 724 (1967).

9. Note, "Managing the Large Class Action: Eisen v. Carlisle & Jacquelin", 87 Harvard Law Review 426, 453 (1974).

10. 479 F. 2d 1005, 1017.

11. 94 S. Ct. 2140 (1974).

12. For instance, Time, June 10, 1974, 57. For a more sanguine outlook, see Analysis, "Eisen IV: Don't Believe The Headlines", 271 Securities Regulation and Law Report B-1 (1974).

13. Committee on Commerce, United States Senate, Class Action Study, 30 (1974); Note, "Managing the Large Class Action: Eisen v. Carlisle & Jacquelin", op.cit., note 9, 453.

14. Trade Practices Act, S.B.C. 1974, c. 96, s.24. The first action under this provision was commenced in September 1975. The Director brought an action on behalf of consumers who had paid money to a freezer food supplier for food and freezers which were not supplied (British Columbia Department of Consumer Services, Enforcement Report, September 23, 1975).

15. Ibid, s.16.

16. New York, N.Y., Administrative Code ch.64, tit. A, ss 2203d-1.0 to 8.0. For an account of the ordinance in operation, see Note, "New York City's Alternative to the Consumer Class Action: The Government as Robin Hood", 9 Harvard Journal on Legislation 301 (1972).

17. The Department of Consumer Affairs Act, S.S. 1972, c.27, s.10.

18. The amendment proposals are set out in Appendix D to the paper of Jennifer Whybrow, The Case For Class Actions in Canadian Competition Policy: An Economist's Viewpoint. Their fate, however, is uncertain. The New York Times of November 16, 1975 reported that "the measure was killed in the House Rules Committee, after its corporate opponents had succeeded in having the measure amended, but not in stopping it, in the House Judiciary Committee" (p.74).

XII. COURT JURISDICTION

Concurrent Jurisdiction

If Bill C-2 is enacted and the damages remedy for a combines offence brought into existence, jurisdiction to enforce the remedy will be shared concurrently by the Federal Court - Trial Division and the courts of the provinces.

The Federal Court will acquire jurisdiction by virtue of the combined operation of section 26(1) of the Federal Court Act and section 31.1(3) of the Combines Investigation Act.

Provincial courts will exercise jurisdiction in accordance with their assigned role within the constitutional framework of providing a forum for the enforcement of rights, whether those rights arise at common law or under legislation, provincial or Federal. As an enactment of the Parliament of Canada, section 31.1 will apply universally throughout Canada, giving individual victims of a Part V offence a cause of action for damages and imposing a corresponding obligation on the offender no matter where the offence was committed.

An action to enforce the cause of action can be brought in the court of a province provided the rules of that court as to its jurisdictional competence are satisfied. For provincial courts, the focus must be on the Supreme Court since the jurisdiction of the lower courts in the hierarchy, County Courts and District Courts, is restricted as to amount of claim.[1] This limitation would effectively keep a class action out of the lower courts as the total amount claimed is the normal test of monetary competence.[2] The Supreme Court of a province will generally exercise jurisdiction over a defendant whatever the subject matter of the claim or the amount in issue provided the defendant can be reached

by the process of the court.[3] This means service of a writ of summons on the defendant within the territorial limits of the province or, if the defendant is not a resident, then outside the province in accordance with the court's rules as to the extra-territorial service of process. The rules for service out of the jurisdiction are somewhat restrictive and in many situations service outside the province will not be allowed. The Supreme Court will then have no jurisdiction to entertain an action (unless the defendant comes into the province and is there served with process)[4] and the plaintiff, if he sues at all, will need to bring suit in the courts of the province or the country (if the defendant is outside Canada) where the defendant resides. With a corporate defendant, the place of residence for the purpose of service is usually the place where it is incorporated or where it carries on business.

Choice of Forum

As the Federal Court and the Supreme Courts of the provinces have concurrent jurisdiction, the plaintiff claiming damages under section 31.1 will have a choice of forum, at least in theory, as geographical factors may effectively compel him to sue in the Federal Court. A provincial Supreme Court will assert jurisdiction over a non-resident in only a restricted number of situations, while the jurisdiction of the Federal Court is Canada-wide as regards the reach of its process.[5] Thus, for example, if the plaintiff resides in British Columbia and the defendant in Saskatchewan, and the British Columbia Supreme Court will not allow service of its process on the defendant outside the province, the plaintiff will bring his action in the Vancouver office of the Federal Court unless he is prepared to go to the trouble of suing in the Supreme Court of Saskatchewan.

Class Action Concurrent Jurisdiction

Assuming the Combines Investigation Act is amended to incorporate a class action procedure, the Federal Court and the provincial Supreme Courts will then have the same concurrent jurisdiction in class actions brought under the Act that will exist for the damages claim of individuals. If the creation of the damages cause of action represents a valid exercise of Federal legislative power, and this entire report rests on that premise, a provision for the class action enforcement of the cause of action must also be valid. If the creation of a substantive right is within the legislative competence of the Parliament of Canada it is equally within the power of Parliament to ensure any special methods of enforcing that right; the enforcement procedure is incidental to the right itself. A class action is such a procedure of enforcement.

Class action procedure in provincial Supreme Courts is governed by a Rule of Court which is essentially the same in each jurisdiction, and which, as a result of judicial interpretation, confines the class action within quite narrow limits. The proposed legislation will conflict with the Rule as it gives the class action a much wider scope. However, if a damages action pursuant to section 31.1 is brought on behalf of a class in the Supreme Court of a province the constitutional principle that gives paramountcy to a federal law where the law of a province is inconsistent ought to ensure that the federal procedure will prevail.

The Federal Court - Trial Divison and provincial Supreme Courts would have concurrent jurisdiction over class actions brought under the Act, unless it is expressly enacted otherwise. The question is whether jurisdiction should be shared between the two systems. The other alternatives are for either the Federal Court or the courts of the provinces to be given exclusive jurisdiction in class actions.

Risk of Multiple Class Suits

It is the collection in one action of the individual claims of a multitude of persons, the essence of the class action concept, that necessitates a decision on the question of what courts are to have jurisdiction. The jurisdiction of a superior court over an action, whether a class action or not, depends on service of the writ or other originating document on the defendant, and not on the place of residence of the plaintiff. The Ontario Supreme Court, for instance, will entertain an action brought against an Ontario defendant served with the writ inside the province whether the plaintiff is an Ontario resident, also, the resident of another province or a foreigner.[7] Similarly, a class action could be brought in a provincial Supreme Court by either a resident or non-resident of the province and the place of residence of members of the class is no more relevant to jurisdiction than that of the representative plaintiff.[8] The class, therefore, might consist of individuals some, or even all, of whom live outside the province. However, individuals injured outside Canada and its territories by the competition offence in question are not eligible to join the class as the Combines Investigation Act does not operate extra-territorially.

Today, except for purely localized ventures, the whole of Canada might well be the market place for goods and services no matter in what part of the country they originate, and activities in one location that are detrimental to competition, and hence to the quality of goods and services and to their price for the consuming public, may have an impact elsewhere. Thus, a product the price of which has been collusively inflated in breach of the Act could be sold outside the province of its manufacture, and individuals across the country could respond to a misleading advertisement appearing in a newspaper that had a national distribution. The offending manufacturer or supplier could therefore

be sued in either the Federal Court or the Supreme Court of a province by a plaintiff representing a class of individuals drawn from the whole or many parts of Canada.

As the description of the class is within the absolute discretion of the representative plaintiff the defendant will truly be at the mercy of the plaintiff as regards the number of adversaries and hence the size of the potential judgment liability. The plaintiff can define the class as he chooses -- all purchasers "within Ontario" or "within British Columbia, Alberta and Saskatchewan" or even "within Canada" -- so just by his choice of the class label the plaintiff at his whim can threaten the defendant with liability either massive or moderate or of dimensions somewhere in between.

The situation for a corporate defendant (and the combines defendant will almost invariably be a corporation) is rendered even more unsatisfactory by the fact that separate actions for a class could be pending against it in different courts at the same time for the identical alleged competition offence. This could occur because many business corporations have a place of business in a province or provinces other than the province of incorporation.[9] Consider this example. An action is brought in Manitoba against a Manitoba corporation on behalf of a class consisting of the alleged victims of the defendant who reside in Manitoba. But the defendant has also a place of business in Alberta. A second action is brought in the Alberta court on behalf of Alberta complainants who allegedly were injured by the same conduct of which the Manitoba class members complain. The situation for the defendant becomes even more distressing if, as a variant of the above, it is supposed that each of them, the Manitoba plaintiff and Alberta plaintiff, sue on behalf of both Alberta and Manitoba victims. Then, if both actions were to proceed to judgment there is a danger that some class members will recover damages

twice over and, correspondingly, the defendants subjected to a double liability, a situation which should not occur but which it might be difficult to prevent altogether when many individuals comprise the class. It is a situation that would not eventuate if one of the courts would stay the proceedings before it in the exercise of its inherent jurisdiction[10] to save a party from the vexation and embarrassment of being forced to defend the same claim brought in effect by the same party in different jurisdictions.[11] The proper court to order the stay would normally be the court in which the second action was commenced.[12] However, a stay of proceedings would not be assured if quite separate classes were represented in the concurrent actions, that is, if the classes neither overlapped nor were identical. To return to the original example, the Alberta court might well refuse to stay the Alberta action because, although the common question was the same in each action, the Alberta class members were not represented in the Manitoba action and so the defendant was not faced with litigation brought essentially by the same parties.

Specific Problem Situations

If provincial supreme courts are to have jurisdiction in class actions brought pursuant to the Act, there are likely to be administrative complications where prospective class members reside in two or more provinces. It is convenient to examine the problems in three situations, which are as follows:

(a) Separate class actions are brought against the defendant by plaintiffs who represent the same or substantially the same class members.

The courts will probably relieve the defendant against oppression of this kind by staying all actions against the defendant except one.[13]

(b) A single class action is brought against the defendant, but some of the individuals who comprise the class reside outside the forum.[14]

The inclusion of non-residents in the class presents no procedural hardship for the defendant, though it raises the amount of damages in issue. It could promote inter-provincial judicial economies as the other provinces in which class members reside will be relieved of litigation that their residents might have brought if they had not been represented already. But, an action for a class that includes non-residents does raise a special problem. If the action succeeds on the questions common to the class, leaving issues on which individual proof is needed, such as purchase, reliance and quantum of damage, it will be difficult to administer relief for class members who reside outside the province in which the action is decided. (This situation assumes that the amounts involved were substantial enough and the class members sufficiently identifiable that the plaintiff was able to persuade the court to allow the action to proceed as a class action. There would be no problem if the court assessed damages on a total class basis). Proof on the separate questions may require the personal attendance of the claimant at the office of the court or, at a more formal level, before a Master or other court officer. However, the Supreme Court of a province has no presence, its process does not run, extra-territorially, and so it has no machinery for processing the claims of class members at a place outside the province. Thus, for example, if judgment for a class is obtained in the Supreme Court of Ontario, a class member living in Fredericton, New Brunswick, who has a $200 claim is not likely to come to Toronto to establish his entitlement. Even if proof by affidavit were allowed, the Fredericton class member is still far less likely to recover than if his claim could be processed in a local courthouse. Affidavits and other modes of paperproof suggests lawyers, and while $200 might support the fee of one lawyer, the fee of both local lawyer and Toronto agent would tend somewhat to discourage the pursuit of the claim if proof could not be offered except in Toronto.

Situation (b) could be eliminated and thus damage distribution among class members simplified by legislation that would restrict the class on whose behalf an action could be brought in the Supreme Court of a province to residents of that province. But this restriction could produce the third situation, (c) described below:

(c) The defendant is sued in class actions brought in two or more provinces, the class in each action consisting only of residents of the particular province.

Damages do not have to be distributed among class members living outside the province, but there are other disadvantages in this situation. First, scarce judicial resources are wasted as the same issues will have to be investigated and adjudicated on twice. Second, the different courts might reach opposite conclusions on the same issue, particularly on the question whether the defendant committed the Part V offence that is alleged, a result that does little to enhance the stature of the judicial process. Third, the defendant will be faced with simultaneous multiple suits raising an identical issue. Class action litigation under the Act will be onerous enough for defendants and it verges on the oppressive if the defendant is compelled to defend the litigation on substantially the same question in several courts at the one time.

Stay of Proceedings

If a defendant were faced with class actions in different courts that raised an identical question, it seems fair from his point of view that all actions but one be stayed until the action that is allowed to proceed is determined. The Supreme Court in which each action was brought does have jurisdiction to grant a stay of the action on application by the defendant but, as noted already, the court might well refuse the application on the ground that a stay would result in delay for resident class members

in getting relief, possibly for an indefinite time, since none of them are represented in the action elsewhere that is to proceed. A stay could really not properly be granted except on two conditions, namely, (1) that the defendant undertook to be bound in the action that was to be stayed by an adverse judgment in the action to be continued, and (2) that in the event of the failure of the action that continued, the plaintiff in the stayed action should be free to proceed with that action for the purpose of seeking a favourable (and contradictory) result. But the defendant's attempts to confine the controversy to one forum would not be completely effective unless every court but the court in which the action was to continue could be persuaded to grant a stay. As the Supreme Courts of the provinces are autonomous and independent of each other there can be no assurance this would happen.[15]

Amending Class Description

If the defendant is not able to secure a stay of class actions that are commenced in different provinces for residents of each province, the situation referred to in (c) above, there is possibly an alternative way of reaching the same result. Suppose class actions are brought in provinces A, B and C, each for individuals who reside in the particular province. If the plaintiff in province A were to amend the class description in his action to include the persons who lived in provinces B and C, the courts in the latter provinces probably could be persuaded to stay proceedings, applying the principle mentioned for situation (a), described earlier. But the courts in provinces B and C have no jurisdiction over the plaintiff in province A, and they could not compel him to make the amendment. Nor, indeed, is it likely that the court in province A would make the plaintiff amend his class description. There is no precedent that would authorize the court in a class action to require the plaintiff to expand the

class of persons on whose behalf he sued. With few exceptions, the rule applying to litigation generally is that the party who brings an action, the plaintiff, has the right to determine what persons should be made parties, whether plaintiff or defendant. Even if the plaintiff did amend the class description to include residents in provinces B and C, if not by court order then on his own motion, there would still be the problem of damage distribution among extra-territorial class members that was outlined for situation (b).

Exclusive Federal Court Class Action Jurisdiction

The procedural difficulties and complexities that have been described could be overcome if the different class actions against the defendant were brought in a court system the jurisdiction of which was not confined to provincial boundaries. The Federal Court has jurisdiction of this kind. Its process extends to every part of Canada. If the Federal Court were given jurisdiction in class actions under the combines legislation to the exclusion of the courts of the province, every class action would be brought in the Court and be subject to its control no matter in what office of the Court the action was commenced or in what location the class members represented resided. The Court would have complete power to protect defendants faced with multiple class actions from embarrassment of the kind mentioned in the different situations described earlier. That power would be independent and its exercise not subject to the concurrence or co-operation of another court. Also, the power could be employed in a way that would reduce the number of actions to be tried and thus conserve judicial resources and save time and expense for the parties, especially the defendant.

The draft proposed legislation gives the Federal Court - Trial Division exclusive original jurisdiction over class actions brought pursuant to the Combines Investigation Act. Exclusive control over class

actions combined with jurisdiction that extends beyond provincial borders ought to enable the Court to secure the adjudication in a single proceeding of the rights of all persons who are already before the Court by representation in actions separately commenced, wherever they may reside. This result would accord with the spirit that moved the courts to devise the class action concept originally and the legislation will give the Court the tools that will be needed to accomplish it. The Court will have power to order and regulate proceedings when several class actions are pending against the defendant at the one time, including the power to grant a stay, to direct consolidation and to amend the description of the parties. It is not possible to predict in what way these powers would be used in a particular case, but one or two examples will demonstrate how, when employed with imagination, the problems that have been referred to earlier could be overcome.

Suppose a class action is commenced in the Ontario office of the Federal Court for persons living in Ontario and another class action in the Manitoba office for Manitoba class members against the defendant on the same cause of action. On motion by the defendant, the Court could consolidate, that is, unite, the two actions so that the two would proceed as one, with the trial taking place in either Toronto or Winnipeg, whichever was the more convenient. Again, suppose an action in the British Columbia office for a class whose members resided in both British Columbia and Alberta and a second action in Alberta on behalf of the same Alberta residents but excluding those in British Columbia. The Court could stay the action commenced in British Columbia and direct the Alberta plaintiff to amend the class description to include British Columbia residents. Alternatively, the course the Court is more likely to follow would be to stay the Alberta proceedings and allow the British Columbia action to continue.

The last example points to another advantage that follows from vesting exclusive class action jurisdiction in the Federal Court. As offices of the Court are located in every province there are none of the difficulties of administering individual relief to class members such as would arise in an action brought in the Supreme Court of a province for a class that included extra-provincial residents. Thus, in the above example, after judgment for the class on the common questions in the Federal Court in Vancouver, any necessary proof from class members who lived in Edmonton on any separate questions that concerned them could be supplied to the Court office in that city.

Exclusive Federal Court Damages Jurisdiction

The proposal to give the Federal Court exclusive class action jurisdiction leaves provincial courts with jurisdiction over the damages cause of action created by section 31.1 where an action is brought for the individual damages of the actual plaintiff or plaintiffs, that is, in actions that are not class actions. In this situation it would still be possible for the defendant to be vexed by multiple proceedings over which no single court had complete control. This would occur if an action for individual relief was brought in a provincial court and a class action in the Federal Court in respect of the same Part V offence. A stay of one action is necessary if the defendant is to avoid having to contest the identical issue simultaneously in different jurisdictions. But the grant of a stay is discretionary and, as noted already, each court, the Federal Court or the provincial Supreme Court, might well refuse to stay proceedings in the action before it on the ground that the two actions are not brought by the same or essentially the same plaintiff. A court will ordinarily stay one of two actions that are brought in different jurisdictions against the same defendant by the same plaintiff on the same cause of action. This was situation (a) described earlier. But even if the defendant succeeded in

obtaining a stay of either the Federal Court class action or the individual action in the provincial court, the result in the action that reached trial would not bind the parties in the other. Thus, there still exists the possibility of inconsistent findings on the question common to both actions.

Defendants would be saved the embarrassment of simultaneous proceedings for a class in the Federal Court and individual actions in the Supreme Courts of the provinces if the Federal Court were given exclusive jurisdiction over all damages claims under section 31.1 of the Act whether the action was brought for individual relief or on behalf of a class.[16] This would require a change to the amendments contained in Bill C-2 so as to provide expressly that damages under section 31.1 could be recovered only in the Federal Court. Unless all damages claims are brought in the Federal Court, there is a danger that a defendant will be exposed to multiple litigation in different courts for the same competition offence, with no single court having complete power to deal with the various proceedings in a way that would protect the interests of all parties and at the same time avoid several trials taking place on the identical question, possibly with contradictory results. The reasons given earlier in support of the proposal that the Federal Court should have exclusive jurisdiction in class actions apply with equal force to giving the Court sole control of the damages remedy no matter what the mode of enforcement.

In conclusion, therefore, this report recommends that the Federal Court - Trial Division should have exclusive jurisdiction to hear and determine claims for damages under section 31.1 of the Combines Investigation Act whether the plaintiff sues for individual damages only or sues also on behalf of a class.

XII: FOOTNOTES

1. In Ontario, for instance, the monetary jurisdicition of the County Court is limited as a general rule to $7,500. (County Court Act, R.S.O. 1970, c.94, s.14(1)).

2. This would seem to be the position for a class action by analogy with the rule that monetary jurisdiction in an action brought by two or more plaintiffs is determined by the aggregated amount of the individual claims. See Rickwood v. Town of Aylmer, (1954) O.W.N. 858.

3. Colt Industries, Inc. v. Sarlie, (1966) 1 All E.R. 673.

4. Laurie v. Carroll (1958), 98 C.L.R. 310, 331; Colt Industries, Inc. v. Sarlie, ibid.

5. "The process of the Court shall run throughout Canada..." (Federal Court Act, R.S.C. 1970 (2nd Supp.), c.10, s.55(1)).

6. The Trial Division of the Federal Court sits at various offices of the Court throughout Canada (Federal Court Act, s.14(1)), but it can sit at any place in Canada that is convenient to transact its business (s.15(1)). The principal office of the Court, called the Registry, is in Ottawa (s.14(1)), and other offices are located in Montreal, Toronto, Vancouver, Halifax, Edmonton, Calgary, Regina Saskatoon, Winnipeg, Quebec City, Fredericton, Saint John, Charlottetown, St. John's, Whitehorse and Yellowknife (General Rules and Orders, r.200).

7. A non-resident, however, may be ordered to give security for the defendant's costs. In Ontario, for instance, see Rules of Practice, r. 373(a).

8. In Ontario the Rules of Practice provide that a class action plaintiff may be ordered to give security for costs if the plaintiff "is not possessed of sufficient property to answer the costs of the action, and it appears that the plaintiff is put forward or instigated to sue by others" (r.373(h)). However, the court will not readily infer that the plaintiff has been put forward or instigated to sue by others. See, Ostrander v. Niagara Helicopters Ltd. (1975), 4 O.R. (2d) 388. If non-residents comprise the class, it seems that security will not be ordered if the plaintiff is a resident of Ontario and has a real interest in the action and is not a nominal party (Rickert v. Britton (1912) 3 O.W.N. 1008).

9. A corporation incorporated under the Canada Corporations Act will have a head office in one province and it may have other offices elsewhere (Corporations Act, R.S.C. 1970, c.32, s.24(1)).

10. A court has an inherent jurisdiction to stay proceedings where the parties are litigating the dispute already in another jurisdiction. The power may also be conferred by statute expressly, for instance, as in the Federal Court (Federal Court Act, s.50) and Ontario (Judicature Act, R.S.O., c.228, s.24). The problem of concurrent proceedings between the same parties can arise in the Federal Court in industrial property litigation as both the Federal Court and provincial courts share jurisdiction in certain matters relating to patents, copyright, trade mark and industrial design (Federal Court Act, s.20).

    The court has a discretion whether to order a stay. The power will be exercised sparingly, and a stay will be ordered only in the clearest

cases (Weight Watchers International Inc. v. Weight Watchers of Ontario Ltd. (1972) 25 D.L.R. (3d) 419 (F.C.); General Foods Ltd. v. Struthers Scientific and International Corp. (1971), 23 D.L.R. (3d) 313 (S.C.); YKK Zipper Co. Canada Ltd. v. Wahl Bros. (1972), 8 C.P.R. (2d) 131.

11. The parties would strictly not be the same as the actual plaintiff would be different in each case. The two actions, however, would be brought on behalf of the same persons.

12. However, mere priority of date in instituting proceedings is not decisive (General Foods Ltd. v. Struthers Scientific and International Corp., YKK Zipper Co. Canada Ltd. v. Wahl Bros. op.cit., note10).

13. Though the grant of a stay is a matter of discretion, and the order may be refused. See note 10.

14. In the United States it has been held that judgment in a class action brought in the court of a state binds all the members of the class whether they are residents of that state or of another state. See, Hartford Life Insurance Co. v. Ibs, 237 U.S. 662 (1915); Taylor v. Pacific Mutual Life Insurance Co., 214 N.C. 770, 200 S.E. 882 (1939); Larson v. Pacific Mutual Life Insurance Co., 373 Ill. 614, 27 N.E. 2d 458 (1940).

15. In General Foods Ltd. v. Struthers Scientific & International Corp. (1970), 18 D.L.R. (3d) 176 (Ex. Ct.), Jackett, P., referring to the situation where Parliament has given two different courts overlapping jurisdiction, as in patent cases, said that "...the courts must have an inherent jurisdiction to take such measures as are available, without injustice to the parties, to avoid the scandal of two different

Canadian courts proceeding to the determination of the same complex and difficult question as between the same parties at the same time," but concluded that "it would not be a responsible exercise of discretion for a court automatically to accede to any request that a matter be stayed as long as some other court was exercising jurisdiction in relation to some part of it. Such an approach would invite "jockeying" between courts that could be a worse scandal than having two Canadian courts trying the same complex question between the same parties at the same time" (182, 183).

16. A quite elaborate set of procedures has been established for the system of Federal courts in the United States to deal with problems of multilitigation of the kind that have been described in the text. Section 1407 of the United States Judicial Code permits the body known as the Judicial Panel on Multidistrict Litigation to temporarily "transfer, for coordinated or consolidated pretrial proceedings, civil actions, having one or more common questions of fact, pending in different judicial districts." The provision evaluates Federal courts to cope with the situation "where the parties would be forced to litigate, and the courts would be forced to consider the same issues repeatedly in...different districts..." (Comment, "A Survey of Federal Multidistrict Litigation" - 28 U.S.C.A.S. 1407, 15 Villanova Law Review 916, 917 (1970). The rules and procedures that regulate the transfer of multidistrict litigation are contained in the Manual for Complex and Multidistrict Litigation. Rule 5.40 in Part I of the Manual deals with conflicting class actions in different judicial districts.

United States experience with multidistrict litigation in Federal courts suggests how similar problems could be disposed of in this country if the recommendations of the report to vest exlusive original jurisdiction over all damages claims in the Federal Court - Trial Division were implemented.

APPENDIX

COMBINES INVESTIGATION ACT AMENDMENTS

Proposals for amendments to the Combines Investigation Act that have been referred to earlier are set out below. The amendments are largely self-contained and, if enacted, will add a new Part to the Act--Part VI.

The amendments will allow a class action to be brought for the damages cause of action created by section 31.1 of the Act, and at the same time establish a code of procedure for regulating the action. The procedure deals with such matters as court jurisdiction, notice to class members, damages distribution, the remuneration of the plaintiff's lawyer and costs. The concluding sections of Part VI will give the Director of Investigation and Research authority to bring an action in the circumstances that were described in section 6 of Chapter 11.

The amendment provisions come from several sources. For instance, section 39.2, the key provision, is to some extent an elaboration of the existing class action Rule of Practice in the common law jurisdictions in this country, though the terminology is modelled on Federal Rule of Civil Procedure 23 in the United States. The drafting of other sections has also been strongly influenced by Rule 23, and still other sections have been taken direct from the Rule. It is inevitable that American developments should have such an impact in the creation of a new class action procedure as in no other common law system has such attention been given by legislature, bench and bar to the task of finding ways of redressing mass grievances in a single proceeding. But the majority of the amendments proposed in the Appendix come neither from existing practice in this countr" nor from the United States. They are entirely o and have been devised specifically to deal wi blems that will be unique to the plan

to allow the class action recovery of damages for a violation of the Combines Investigation Act.

There can be no question that difficulties will be encountered in implementing what will be a novel kind of procedure, and formal rules such as those contained in the amending legislation cannot do much more than offer guidelines for overcoming them. The satisfactory resolution of actual problems must depend ultimately on the spirit in which judges and lawyers approach the task. The class action can work if those responsible for administering the procedure wish to see it work.

PROPOSED AMENDMENTS TO COMBINES INVESTIGATION ACT

PART VI

CLASS ACTIONS

Definitions 39.1 In this Part "class" means a class of persons who have suffered loss or damage as a result of

(a) conduct that is contrary to any provision of Part V, or

(b) the failure of any person to comply with an order of the Commission or a court under this Act.

("court" means the Federal Court-Trial Division.)

The report proposes that the Federal Court - Trial Division should have exclusive jurisdiction in all damages actions under section 31.1 of the Combines Investigation Act, whether the action is brought just for the individual relief of the plaintiff or brought on behalf of a class as provided in Part VI. This would require an amendment to Bill C-2, which at present vests concurrent jurisdiction in actions for damages under section 31.1 in the Federal Court and the courts of the provinces. To give the Federal Court exclusive original jurisdiction in damages actions of whatever kind section 31.1 needs to be amended as follows:

1. By substituting in section 31.1(1) for the words "in any court of competent jurisdiction" the words "in the Federal Court of Canada - Trial Division."

2. By substituting for section 31.1(3) the following:

"For the purposes of any action under subsection (1) or of any action under Part VI, the Federal Court - Trial Division shall have exclusive original jurisdiction."

If the proposal to give the Federal Court exclusive jurisdiction in all damages actions under the Act is implemented, the words defining "court" in parenthesis in the draft section 39.1 are not necessary and can be omitted. This definition, however, must appear if the alternative proposal that would limit the exclusive jurisdiction of the Federal Court to class actions is adopted.

The report does not recommend that provincial courts share jurisdiction in class actions and consequently the draft legislation does not provide for this situation.

When class action allowed

39.2 One or more members of a class may sue in the court as representative party on behalf of all provided:

(1) the class is numerous;

(2) there are questions of law or fact common to the class; and

(3) the representative party will fairly and adequately protect the interests of the class.

This section sets out the minimum requirements for a class action under the Act. An action cannot proceed as a class action unless the three enumerated conditions are satisfied. Section 39.3(3) contains

some additional requirements which the court will consider when the plaintiff applies for leave to maintain the action as a class action.

Section 2 is adapted from Rule 23(a) of the Federal Rules of Civil Procedure (called hereafter "F.R.C.P.") in the United States, though the first two subsections are essentially an elaboration of the pre-requisites for maintaining a class action in this country under the Practice Rule of the Federal Court and the courts of the provinces. Subsection (1) follows the existing Rule of Practice in requiring that the members of the class be numerous. This requirement was examined in Chapter 10, section 1. Subsection (2) states more fully the "same interest" element of the present Rule (See Chapter 3, section 1; Chapter 4, section 4). It follows F.R.C.P. 23(a) and is the raison d'être of the class action procedure: the existence of questions of fact or law that are common to the claim of the plaintiff and to the claims of the class members whom he represents. Subsection (2) must be read with section 39.3(3) and (4), which provide that the court may consider whether the common questions predominate sufficiently to justify the action being allowed to continue as a class action.

Subsection (3) is taken from F.R.C.P. 23(a) and is entirely new for Canadian jurisdictions. It would impose on Canadian courts for the first time a positive obligation to inquire into and determine the adequacy of the representation provided by a plaintiff who sues on behalf of a class.

Order that action be maintained as class action	39.3	(1)	After the commencement of an action brought under section 39.2, the plaintiff shall apply to the court for an order that the action is to be maintained as a class action.

(2) The plaintiff shall apply to the court under subsection (1):

(a) If the defendant has filed a defence, on notice to the defendant within one month after the filing of the defence or within such further time as the court may allow, or

(b) if the defendant has not filed a defence within the time limited by the general rules and orders of the court, within one month after the date of the default or within such further time as the court may allow,

and in default of such application by the plaintiff the court may make all such amendments to the proceedings as will eliminate therefrom all reference to the representation of absent persons.

(3) The court shall order that the action is to be maintained as a class action if the conditions set forth in section 39.2 are satisfied and the court finds that:

(a) the action is brought in good faith and appears to have merit; and

(b) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

(4) In determining whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy, the court shall consider among other matters:

(a) whether common questions of law or fact predominate over any questions affecting only individual members,

(b) the difficulties likely to be encountered in administering relief to members of the class by reason of the size of their individual claims and the number of class members.

(5) The court shall not refuse to order that the action is to be maintained as a class action only on the grounds that:

(a) the relief claimed for members of the class is damages;

(b) any damages claimed for members of the class will require individual calculation; or

(c) the relief claimed for members of the class arises out of separate contracts or transactions made or taking place between members of the class and the defendant.

(6) If on application by the plaintiff as provided by subsection (2), the court determines that the action is not to be maintained as a class action, the court shall make all such amendments to the proceedings as will eliminate therefrom all reference to the representation of absent persons.

(7) An order that an action is to be maintained as a class action shall:

(a) define the class on whose behalf the action is brought;

(b) describe briefly the nature of the claim made on behalf of members of the class and specify the relief claim;

(c) define the questions of law or fact common to the class;

(d) specify a date before which members of the class may exclude themselves from the class.

(8) The court, in making an order or refusing to make an order that the action is to be maintained as a class action, shall indicate the basis for its decision including its reasons and conclusions on the matters referred to in subsection (4).

(9) For the purpose of an appeal to the Federal Court of Appeal an order either that the action is to be maintained as a class action or that the action is not to be so maintained is a final judgment of the court.

This section introduces another new feature for class action procedure by providing that an action commenced as a class action cannot be continued as such without the leave of the court. If leave is refused, the court is required by subsection (6) to amend the proceedings so as to eliminate any reference to the representative capacity in which the plaintiff sues. This accords with the practice that is normally followed under the present class action Rule when it is held that the plaintiff has not satisfied the common interest condition. The amendment will ensure that any judgment subsequently pronounced in the action will bind only the immediate parties, a result which is reinforced by section 39.6.

The making of an order under section 39.3 has important consequences. Not only will the action proceed as a class action, but also the special costs rules in sections 39.11, 39.12 and 39.13 will apply to the proceedings.

The plaintiff has the burden of obtaining an order that the action is to be maintained as a class action. Subsection (2) fixes the time within which the application is to be made, though further time may be granted by the court. If the plaintiff fails to apply for an order, the court must make the same amendments to the proceedings that are required when the court has refused to make an order. The court would amend on the motion of the defendant.

Subsection (3) is a key provision in the new procedure. It imposes additional requirements to those of section 39.2 that must be satisfied before the court can allow an action to be maintained as a class action. The condition in subsection 3(a) that the plaintiff demonstrates good faith and a claim that has merit was examined in Chapter 9, section 3 and does not need elaboration here.

The requirement in subsection 3(b) that a class action is superior to other available methods for the fair and efficient adjudication of the controversy is imported from F.R.C.P. 23(b)(3)* and has to be read in conjunction with subsections (4) and (5). Other available methods which the court might consider in determining whether a class action is superior for resolving the instant controversy are a pending test action against the defendant by the result of which the defendant will agree to abide, separate actions by individual class members, whether actually brought or about to be brought, and the consolidation of pending separate actions brought by class members. The predominance of the common questions over any separate questions, mentioned in subsection (4)(a),

*In fact, from a version of F.R.C.P. 23(b)(3) in a class action statute that has been proposed for state courts by the National Conference of Commissioners on Uniform State Laws (Third Tentative Draft, August 2, 1975).

is a factor the court must consider in determining the question of class action superiority. To adopt the language of the Advisory Committee that was responsible for drafting the revised Federal class action rule in the United States in 1966, it is when the common questions predominate that "a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." It is by these considerations that the predominance of the common questions must be judged, and not by any numerical comparison of common and separate questions.

In conjunction with the test of common question predominance, the object of subsection (5) is to abolish the restriction that exists in Canada that does not allow a class action when the members of the class seek damages that require individual calculation or the claims arise out of separate contracts or transactions with the defendant. (See Chapter 4, section 5). Subsection (5) will ensure that the courts do not in future dismiss a class action on the ground only that the class claim has these characteristics.

When the court determines the matter of class action superiority, a factor to be considered that is equally as important as common question predominance is the issue of manageability (ss.4(b)). The court is entitled to refuse the plaintiff leave to continue the action as a class action if it concludes that if the action succeeded at trial on the common questions, individual relief could not be administered to class members except at a cost and through an expenditure of time and effort that could not be justified by the convenience considerations that are supposed to provide the class action rationale. On the other hand, another court in the same situation might view the prevention of unjust enrichment and deterrent effect of a class action as no less significant than the compensatory function, and, if the assessment could be made without individual class

member participation, it might assess the damage caused to the class as a whole by the defendant's anticompetitive behaviour, and make the defendant responsible for that sum. A court that would assess damages in this way would not refuse a plaintiff leave to proceed with a class action under subsection 4(b); any "difficulties likely to be encountered in administering individual relief to members of the class" are immaterial. The question of class action manageability was examined in Chapter 11.

The binding character of the judgment in a class action was mentioned in Chapter 3, sections 1 and 3. If after judgment is rendered in a class action an individual brings an action against the same defendant, the question may arise whether the action is barred by the judgment. The answer will depend on what issue was decided and on what persons were represented in the class action. Subsection (7) has been inserted in an attempt to ensure that in a class action brought under the Act these questions are not left uncertain. Also, the subsection requires the court to specify a date before which members of the class may exclude themselves from the action. Judgment in the action will not bind class members who opt out of the class (s.39.7).

Subsection (8) is important in connection with the right of the Director of Investigation and Research under section 39.15 to bring an action for damages, and it will be dealt with when that section is examined.

The effect of subsection (9) is to give the unsuccessful party, whether plaintiff or defendant, on a motion by the plaintiff under subsection (1) for an order that the action is to be maintained as a class action, a right of appeal to the Federal Court of Appeal by filing a notice of appeal within thirty days of the order (Federal Court Act, s.27 (1)(a), s.27 (2)(b)).

Amending order for maintenance of class action

39.4 An order that the action is to be maintained as a class action may be altered or amended before judgment in the action.

This section is based on F.R.C.P. 23 (c)(1). It allows the court to alter or amend the order that the action is to be maintained as a class action if, upon fuller development of the facts, the original determination appears unsound (Advisory Note, 39 F.R.D. 69, 104 (1966)).

Notice to Class

39.5 (1) If the court makes an order under section 39.3 that an action is to be maintained as a class action, the court may order that notice be given to members of the class advising them of the pendency of the action and that the court will exclude them from the class if they so request by a specified date and that judgment in the action, whether favourable or not, will include all members who do not request exclusion.

(2) If the court makes an order that notice be given to members of the class, the court shall give directions as to:

(a) the members of the class to whom the notice is to be given,

(b) the terms of the notice,

(c) the mode of giving notice, including notice by advertisement.

(3) The court shall take the following matters into account when determining whether to order that notice be given to members of the class or in considering what directions to give under subsection (2):

(a) the cost of giving notice in relation to the size of the individual claims of members of the class;

(b) whether members of the class are likely to suffer substantial prejudice if they do not receive notice of the pendency of the action

This section authorizes the court to direct notice to the class of the pendency of the action once it is determined that the action is to be maintained as a class action. F.R.C.P. 23 contains a notice provision but it differs from section 39.5 in that notice is mandatory whereas under the section the court has a discretion whether to direct notice or not. The notice requirement in the United States was examined in Chapter 7, section 3.

In giving the court a discretion as to notice, section 39.5 contemplates that in some situations no notice will be directed at all and that in others notice will only be minimal. The object of notice is to avoid prejudice to class members resulting from the judgment that ultimately may be pronounced in the action. The notice gives members the opportunity to exclude themselves from the class. Yet widespread notice may prove so costly as to be prohibitive. Subsection (3) endeavours to strike a balance between these conflicting considerations by requiring the

court to take the matters mentioned in the provision into account in exercising the discretion as to notice. Part (a), for instance, might justify the court dispensing with notice altogether in a situation such as Chastain (see Chapter 3, section 1), where the class numbered thousands and the individual sums at stake were not large. Part (b) deals with the risk of prejudice to class members who do not get notice. Prejudice in this sense was discussed in Chapter 7, section 4, and it was concluded that the risk was not very great if the claims of class members was so small that they probably would not have sued themselves or if the class was adequately represented by the plaintiff and his lawyer.

The new procedure emphasizes the adequacy of class representation rather than notice to the membership as the measure for safeguarding the interests of class members in the event of an adverse result. The court must be satisfied that the representative parties will fairly and adequately protect the interests of the class before it can allow the action to be maintained as a class action (ss. 39.2(3), 39.3(3)). Notice to class members is of secondary importance when their claims are being presented in a competent way. Courts in the United States have been prepared to consider the skill and experience of the counsel retained by the plaintiff in determining the adequacy of the class representation. Canadian courts can be expected to be rather more reluctant in making this kind of inquiry.

Notice given to a class member under the statute will inform him of the pendency of the action and afford him the opportunity to exclude himself from the class or to challenge the adequacy of representation. But notice will not be fully effective for the opting-out function unless it is communicated to every class member, and this will not always be practicable. Comprehensive service, however, is unnecessary if the notice is viewed primarily as a means of allowing the class to test the quality of class representation. This purpose will be

achieved sufficiently if notice is sent to an adequate number of randomly-selected class members since it is probable that their response will be representative of the class as a whole (Kaplan, "Federal Rules Amendments". 81 Harvard Law Review 356, 396 (1967); Dole, "Consumer Class Actions Under the Uniform Deceptive Trade Practices Act," Duke Law Journal 1101, 1126 (1968)).

Judgment after proceedings amended	39.6	Whenever pursuant to this Act the court amends proceedings so as to eliminate therefrom all reference to the representation of absent persons the court at the trial of the action shall give judgment in such form as to affect only the parties to the action.

This provision was examined in relation to section 39.3(1).

Exclusion from class	39.7	Judgment in a class action shall not affect a member of of the class who has excluded himself from the class.

This section was examined in relation to section 39.3(7).

No discontinuance, etc., without leave	39.8	A class action shall not be discontinued or dismissed or compromised without the approval of the court and the court may order notice of such proposed discontinuance, dismissal or compromise to be given in such manner and to such members of the class as the court directs.

This provision follows F.R.C.P. 23 (e). The legislation that regulates shareholders' derivative actions contains similar machinery. (See, for instance, Business Corporations Act, R.S.O. 1970, c.53, s.99 (6), and Chapter 9, section 3).

Under existing practice, a representative plaintiff is free to reach a settlement of his claim with the defendant, and the leave of the court is not required. Also, the plaintiff can discontinue the action without leave provided he acts within the time specified by the Rules of Practice (Rule 320 in Ontario). Neither settlement nor discontinuance will extinguish the cause of action of the class members and they are entitled to commence separate proceedings. However, if time has expired under the relevant limitation period for bringing an action when the plaintiff terminates the class action, it will probably be too late for class members to sue individually. (Under Section 31.1 (4) of the Combines Investigation Act a damages action must be brought within two years from the date of the commission of the offence relied on or the date of final disposition of any criminal proceedings relating thereto, whichever is the later).

The difficulty caused by the running of time under the limitation period fixed by section 31.1 (4) can be overcome by substituting a member of the class for the original plaintiff and allowing him to carry on with the action. This can certainly be done in the case of discontinuance (McPherson v. Gedge (1833), 4 O.R. 246, 262; Re Ritz v. New Hamburg (1902) 4 O.L.R. 639; Moon v. Atherton, (1972) 3 All E.R. 145), and there is no reason why the same course could not be followed where the plaintiff's claim has been satisfied pursuant to a compromise. (See La Sala v. American Savings & Loan Association (1971), 98 Cal. Rptr. 849). The problem is really one of notification for it is possible that members of the class will not learn of what has happened to the action until after it has been brought to an end.

It is not clear whether in that situation the court would have power to reinstate the action so as to allow the class claim to be prosecuted by a class member substituted for the original plaintiff. Assuming, however, there was such a power, it would certainly be discretionary, and the court could well refuse to reinstate if there were too long an interval since the plaintiff had terminated the action.

Section 39.8 provides that a class action shall not be discontinued or dismissed or compromised without the leave of the court and gives the court power to direct notice to class members of the proposed termination. If the plaintiff is proposing simply to dispose of his own claim, the purpose of the notice will be to inform the class of that fact and give members the opportunity to be substituted in order to carry on with the action. The extent of distribution of notice is left to the discretion of the court. Consistent with the approach taken under section 39.5 toward notice of the pendency of the action, it is contemplated that extensive notice would not normally be directed.

On the other hand, the plaintiff may be purporting to settle the entire class claim as, for instance, by accepting a sum to be distributed among class members. Though the compromise of the personal claim of the representative plaintiff does not bind the class, the compromise of the action itself may be another matter. If the representative plaintiff can carry the action to the point of a judgment at trial which will bind the class, there seems to be no reason in principle why he should not also have power to reach a compromise that binds the class. The requirement of court sanction of the compromise should be a safeguard against arrangements made between representative plaintiff and defendant to settle the claims of class members for less than what they are worth, a result which incidentally will impair the deterrent value of the class action. (See Chapter 9, section 8). The court could direct notice to the class if it were considered that the members might wish to express their opinion on the adequacy of the proposed compromise.

Adjudication on individual questions

39.9 Where at the trial of a class action the court gives judgment for the plaintiff and the judgment does not determine a question or questions of law or fact that affect only individual members of the class, the following provisions shall apply:

(1) The court may order that notice be given in such a manner as it may direct to members of the class.

(2) Notice given under subsection (1) shall:

(a) inform members of the class of the judgment;

(b) direct them to file within a time to be specified in the notice such particulars of the claim against the defendant for the relief specified in the order that the action be maintained as a class action as the court shall require;

(c) state that in default of the filing of a claim a class member shall not recover against the defendant the relief specified in the order that the action be maintained as a class action except by separate action brought by the class member against the defendant.

(3) In default of the filing of a claim as provided by the notice given under subsection (1), a class member shall not recover against the defendant the relief specified in the order that the action be maintained as a class action except by separate action brought by the class member against the defendant.

(4) The court shall determine the claim of a class member filed in accordance with the notice given under subsection (1) and may pronounce such judgment on the claim as the court thinks fit.

(5) In proceedings to determine the claim of a class member, the class member and the defendant shall have the same rights of discovery against each other and be subject to the same liability for costs as the parties in an ordinary action in the court and the defendant shall have the same right to pay money into court as the defendant in an ordinary action.

This section establishes the procedural machinery for disposing of the claims of individual class members in the event that the court gives judgment for the plaintiff on the questions common to the class. Members of the class would then normally need to be notified of the judgment to give them an opportunity

to present their claims. Notice could be dispensed with only in cases where the defendant had a record of the members of the class, proof of some fact personal to the claimant such as reliance was not an element of the cause of action and each class member was entitled to the same damages or, if the damages varied, the amount for each member could be determined from the defendant's records.

Notice to the class will be necessary where the identity or entitlement of the members cannot be established without their personal participation. The form and extent of distribution of the notice will be determined by the particular circumstances of the case. Whether the court will direct that notice be given individually to all the members or merely to a random sample or whether it will regard notice by advertisement in the media as sufficient, or perhaps order a combination of individual notice and advertisement, should be governed by the size of the class, the amounts of individual claims and the cost of notice. The fact that class members are identified is an important consideration. For instance, if the defendant is in regular correspondence with class members, as in the case of a department store sending monthly accounts to charge customers, the court might order it to enclose a notice with the next account.

Subsections (2) and (3) will not necessarily bar the rights of class members if they do not file notice of claim within the time specified by the court. They lose the right to participate in the judgment, but are free to bring a separate action against the defendant, provided the limitation period specified in section 31.1(4) has not expired. However, few separate actions are likely to be brought if the individual claims of class members are only small. In any subsequent action, only the questions that affect just the plaintiff will remain to be decided as the class action judgment will have determined all the questions between plaintiff and defendant

that were common to the class members. In view of the possible serious consequences of default in filing a claim, the court is likely to require more extensive service and publication of notice of the judgment than in the case of the earlier notice of the actual commencement of the action, particularly if the individual amounts at stake are substantial.

Subsections (4) and (5) deal with the actual determination of individual claims if they are contested by the defendant. The ordinary rules as to discovery and costs will apply as between the defendant and each claimant, which should overcome one of the objections to class actions for damages that has been raised in the past (see, Chapter 4 section 5). In addition, the payment into court procedure applying in an ordinary action is made available to the defendant.

Agreement for Contingent Fee	39.10	(1)	The attorney or solicitor of a person who proposes to commence or has commenced an action under section 39.2 may make an agreement in writing with his client regarding payment for the business to be done by the attorney or solicitor in connection with the action which stipulates for payment only in the event of success in the action.
		(2)	For the purpose of subsection (1), success in the action includes a compromise of the action by which the defendant admits liability on the questions of law or fact common to the class that are defined in the order that the action is to be maintained as a class action.

(3) No agreement made in accordance with subsection (1) shall provide that the amount to be paid to the attorney or solicitor shall be a percentage of the amount recovered in the action for the client or for the members of the class, and any agreement that does so provide shall to that extent be invalid and unenforceable.

(4) When an agreement is made in accordance with subsection (1), the attorney or solicitor shall:

(a) if the action to which it relates has not commenced, file the agreement in court at the time the action is commenced and serve a copy on the defendant at the time of service of the originating document in the action.

(b) if the action has commenced, forthwith file the agreement in court and serve a copy on the defendant.

The rationale of the proposal to allow the lawyer for a class action plaintiff to act on a contingency basis was explained in Chapter 9.

The object of section 39.10 is to authorize lawyers who practice in jurisdictions that do not allow contingent fees to act on a contingency basis

when representing a class action plaintiff in the Federal Court. Newfoundland, Ontario, Prince Edward Island and Saskatchewan are the provinces that do not permit the arrangement.

The language of subsection (1), in particular the expressions "payment for business to be done by the attorney or solicitor" and "which stipulates for payment only in the event of success in the action," are adapted from sections 18 and 30 of the Ontario Solicitors Act (Solicitors Act, R.S.O. 1970, c.441). Section 30 of that Act makes contingent fee arrangements invalid.

Subsection (4) provides for the filing in court of the contingency fee agreement and the service of a copy on the defendant. At least two of the provinces that allow contingent fee arrangements require the agreement to be filed in court (Alberta, Judicature Act, R.S.A. 1970, c.193, s.40, Rules of Court, rr. 615-18, 646; Manitoba, Law Society Act, R.S.M. 1970 c. L100, s.49, Queen's Bench Rules, r.638-A). The further requirement imposed by subsection (4) that a copy of the agreement be served on the defendant will notify the defendant of the financial interest of the plaintiff's lawyer in the outcome of the action and provide yet another safeguard against abuse of the contingent fee. A similar suggestion was made by Lord Denning, M.R. in Wallersteiner v. Moir (No. 2), (1975) 1 All E.R. 849, 860, noted in Chapter 9, section 5, footnote 8.

Costs of action

39.11 (1) Subject to subsection (2), the costs of and incidental to an action brought under section 39.2 shall be in the discretion of the court and shall follow the event unless otherwise ordered.

(2) No costs shall be awarded to the defendant at any stage of the action, including appeal, except that the court may award costs to the defendant on:

(a) a motion under section 39.3

(b) a determination of the claim of a class member under section 39.9.

(c) an interlocutory motion.

The operation of this costs provision is explained in Chapter 9, sections 2 and 3.

Subsection (2)(c) gives the court power to order the plaintiff to pay costs on a interlocutory motion, for example, on an application by the defendant that the plaintiff deliver better particulars of the statement of claim or file and serve a proper list of documents on discovery.

Determining contingent fee

39.12 If the plaintiff and his attorney or solicitor have entered into an agreement in accordance with section 39.10 and at the trial of the action the court awards costs to the plaintiff, the following provisions shall apply:

(1) The court shall determine:

(a) the amount the attorney or solicitor is to receive pursuant to the agreement and,

(b) the amount of costs for which the defendant would be liable if costs were awarded to the plaintiff between party and party as in the case of an ordinary action in the court.

(2) In determining the amount referred to in subsection (1)(a), the court, in addition to any other relevant matter, shall have regard to the fact that the attorney or solicitor was entitled to receive payment only in the event of success in the action.

(3) The amount determined by the court in accordance with subsection (1)(a) shall be greater than the amount determined in accordance with subsection (1)(b).

(4) The defendant shall pay for costs the amount determined in accordance with subsection (1)(b).

(5) The court may order the defendant to pay for costs in addition to the amount determined in accordance with subsection (1)(b) so much of the difference between that amount and the amount determined in accordance with subsection (1)(a) as the court in its discretion thinks proper.

(6) So much of the difference in the amounts referred to in subsection (5) as the court does not order the defendant to pay shall be paid to the plaintiff or his attorney or solicitor out of the sum or sums awarded against the defendant to the plaintiff and to the members of the class on their respective claims in the action.

The operation of this section is explained in Chapter 9, section 7.

Fee on compromise of action

39.13 If the plaintiff and his attorney or solicitor have entered into an agreement in accordance with section 39.10 and by virtue of a compromise of the action the attorney or solicitor becomes entitled to payment under the agreement, the court shall determine the amount the attorney or solicitor is to receive and the provisions of section 39.12 (2) shall apply to such determination.

This section will assure a court scrutiny of the quantum of the contingent fee earned by the plaintiff's lawyer when a class action is brought to an end by a settlement as distinct from a judgment for the plaintiff on the merits.

Concurrent actions

39.14 When two or more actions for damages brought pursuant to section 31.1 are pending in the court against the same person in respect of the same conduct alleged to be contrary to a provision of Part V or of the same failure to comply with an order of the Commission or a court under this Act, and one action at least is brought pursuant to section 39.2, the court may make such orders for a stay of proceedings, consolidation, change of parties, amendment of description of parties or place and date of trial as the court considers just and appropriate in the circumstances.

The operation of this section was explained in Chapter 12, section 8.

Action by Director

39.15 (1) Where on an application for an order that an action is to be maintained as a class action, the court refuses to make the order on the ground that by reason of the matters referred to in section 39.3(4)(b) a class action is not superior to other available methods for the fair and efficient adjudication of the controversy, the Director may commence an action against the defendant in the court for the relief referred to in section 39.18.

(2) No action may be brought under subsection (1),

(a) in the case of an action based on conduct that is contrary to any provision of Part V, after six months from the day on which the court made the said order of refusal or after the period referred to in section 31.1(4)(a), whichever time is the later; and

(b) in the case of an action based on the failure of any person to comply with an order of the Commission or a court, after six months from the day on which the court made the said order of refusal or after the period referred to in section 31.1(4)(b), whichever time is the later.

"Director" in this section and the sections following means the Director of Investigation and Research appointed under the Combines Investigation Act (Combines Investigation Act, s.2).

The scheme whereby the Director of Investigation and Research may bring an action for damages for a Part V violation or a failure to comply with an order of the Restrictive Trade Practices Commission or of a court is explained in Chapter 11, section 6.

The Director has no standing to sue under section 39.15(1) unless the court in the original class action has refused the plaintiff leave to maintain the action as a class action on the ground mentioned in section 39.3(4)(b). If leave is refused on this ground, that fact will be known as the court is required by section 39.3(8) to state its reasons for decision.

Subsection (2) is intended to preserve the right of the Director to sue in the event that the limitation period fixed by section 31.1(4) of the Act has expired when the court makes the order of refusal mentioned in subsection (1).

Nature of claim — 39.16 An action commenced by the Director pursuant to section 39.15 shall be brought for the same class of persons that was represented and for the same conduct contrary to Part V or failure to comply with an order of the Commission or court that was alleged in the action for which the court refused to make an order that it be maintained as a class action.

This provision makes it clear that the Director in effect sues as a substitute for the plaintiff in the original action, at least as regards the Part V offence or failure to comply that was the basis of that action and the class members for whose loss damages were claimed.

Requirements of action — 39.17 An action shall not be brought by the Director unless:

(1) there are questions of law or fact common to the class.

(2) the total amount of the liability of the defendant to all members of the class could be calculated with reasonable accuracy without individual proof by the members, assuming that at the trial of the action the court were to make a finding against the defendant on the common questions.

In an action by the Director there is no counterpart of the procedure established by section 39.3 in the case of an ordinary class action for a preliminary court scrutiny of the plaintiff's claim. Ordinarily, it could be expected that proof by the Director of the conditions set forth in this section would be left until the trial of the action.

Relief to be claimed

39.18 The relief claimed in an action brought by the Director shall be for an order that the defendant pay to the Director the amount of the total liability of the defendant to all members of the class.

Sections 39.18 and 39.19 require no special explanation. They are dealt with in Chapter 11, section 6.

Judgment for total liability

39.19 Where at the trial of an action brought by the Director the court makes a finding against the defendant on the questions of law or fact common to the class the court shall determine the total amount of the liability of the defendant to all members of the class and pronounce judgment for the Director against the defendant for that amount.

Costs 39.20 The costs of and incidental to an action brought by the Director shall be in the discretion of the court and shall follow the event unless otherwise ordered.

The Director of Investigation and Research requires no special costs protection and the usual costs rules will apply to an action brought by the Director under section 31.15.

Payment into Consolidated Revenue Fund 39.21 The sum paid by the defendant to the Director in accordance with the judgment pronounced pursuant to section 39.19 shall be paid by the Director into the Consolidated Revenue Fund.

This provision is explained in Chapter 11, section 6.

Class claims barred 39.22 (1) A judgment pronounced for the Director in accordance with section 39.19 shall extinguish the damages claims of members of the class against the defendant arising under section 31.1 in respect of the conduct contrary to Part V or the failure to comply with an order of the Commission or court that was alleged in the action.

(2) Nothing in subsection (1) shall prevent the plaintiff in the action referred to in section 39.15(1) from obtaining judgment against the defendant for the relief claimed in the action for the plaintiff.

Subsection (1) ensures that the defendant will not have to pay damages twice over in respect of the same injury, once to the Director and a second time to the actual victim. This protection against double liability is probably superfluous as it is not likely that an individual class member would sue for his own damages since ordinarily the claim would be too small to warrant an action. It was the fact that individual claims were so small that was a reason for the court in the original class action concluding that the action was unmanageable, thus giving the Director standing to bring an action under section 39.15.

Subsection (2) allows the plaintiff in the original class action to continue the action for his own relief unaffected by any judgment the Director may obtain.

THE CASE FOR CLASS ACTIONS IN CANADIAN COMPETITION POLICY: AN ECONOMIST'S VIEWPOINT

by

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CONTENTS

I. INTRODUCTION

The 1975 amendments to the Combines Investigation Act give private individuals a statutory civil recourse for damages for the first time under Canadian anti-combines law (see Appendix A). Consideration is now being given to allowing the civil damages remedy to be brought by way of a class action.

The class action is essentially a procedural device whereby an individual, the class representative, may sue on behalf of a group of persons who have suffered much the same harm as the result of similar actions of a particular defendant. Historically, the procedure was intended to avoid multiple actions by individuals with the same grievance against a common defendant. However, in the United States, where experience with the class action procedure has been considerable, the modern class action has come to be recognized, especially in the area of consumer matters, as the only effective means of private redress where the loss suffered by each individual is so small as to render individual litigation uneconomic. Under these circumstances, a procedure which allows this type of action rather than economizing by reducing the number of potential suits, encourages litigation that in its absence would never occur.

This paper is intended to present the economist's view of class actions. It seeks to determine what role private, collective action can play in Canadian competition policy.

Chapter II examines the role of the class action in encouraging a more optimal allocation of resources. The primary objective of competition policy, that is bringing about more efficient economic performance, is discussed. The class action is then presented in a Coasian framework in order to analyse its effectiveness in reducing transactions costs. Some

conclusions are made about the efficiency of the class procedure as a method of organizing private, collective action against monopolistic practices in the economy.

In Chapter III, the efficacy of the class action procedure in fulfilling certain goals of anti-combines policy will be discussed. These goals are: (1) deterrence; (2) compensation of injured parties; and (3) the prevention of unjust enrichment.

Chapter IV discusses some of the administrative problems surrounding the class procedure. Some solutions which have been adopted in the United States for overcoming these administrative difficulties will be examined. These new approaches include fluid class recovery and *parens patriae* suits.

Finally in Chapter V, conclusions are presented as to the value of a class action procedure in the enforcement of the *Combines Investigation Act*.

II. CLASS ACTIONS AND RESOURCE ALLOCATION

Competition and Efficiency

> The institution and maintenance of a competition policy such as presently exists in Canada may be taken to reflect a belief that, over the greater part of the economy, competitive market forces are potentially capable of allocating resources better and more cheaply, with a less cumbersome administrative overhead, than any alternative arrangement such as wholesale public ownership and control, detailed government regulation of enterprise, or self-regulation by large industrial units within a corporate state.[1]

The aim of any competition policy should be to bring about efficient economic performance by correcting the misallocation of resources which results from monopoly. The greatest objection to monopoly is that it distorts the way in which real resources are brought together in the economy. The monopolist produces too little output and sells this output at too high a price relative to production and prices in more competitive sectors. This misallocation reduces the economic welfare of society as a whole. The welfare loss due to monopoly is illustrated in Figure 1.

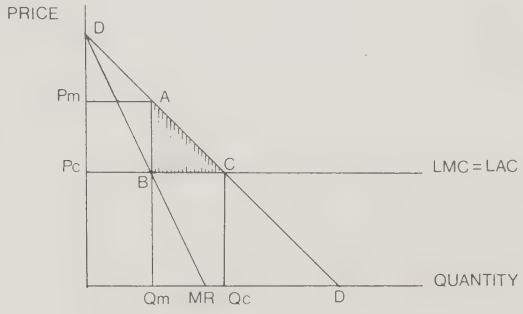

FIGURE 1

The long-run demand curve for the given product is D-D. D-MR is the marginal revenue curve for a single firm monopoly. LMC=LAC is the long-run marginal cost curve and long-run average cost curve which is equal and constant for all firms in the industry. If the product was produced by perfectly competitive firms, output would be Qc and would be sold at the competitive price, Pc. However, if the product was produced by a single firm, that is a monopoly, marginal revenue would be equated to marginal cost, output would be less, Qm, and the price would be higher, Pm. The area PcPmAB represents the excess profits earned by the monopolist. The shaded triangle ABC is the "dead-weitht loss" due to monopoly. This net welfare loss results from the monopolist's misallocation of resources; it accrues to no-one - not to producer nor to consumer - and cannot be recouped even if the state were to tax away the excess profits, PcPmAB.[2] The inefficiency will remain as long as price diverges from marginal cost. The economic welfare of society would be greater if the dead-weight loss due to monopoly could be eliminated or at least minimized.[3]

There are various methods by which a more optimal allocation of resources to reduce inefficiency could be pursued. The public enforcement of anti-combines laws is only one of these methods. Society could allow the free play of market forces, or create new property rights. It could opt for public regulation or state ownership of resources or adopt some combination of these methods. One option would be to permit large groups of consumers to challenge monopolistic restrictions. The class action is simply a procedure for organizing such collective action.

Externalities and Antitrust: the Coase Theorem

It has been argued that an optimal allocation of resources can be achieved, given certain restrictive assumptions, by allowing the free play of market forces, or bargaining between parties.[4]

The analysis is framed in the context of externalities or external effects - actions by firms or individuals that impose harm or uncompensated social costs upon others. The classical example of an externality is that of the factory that pollutes the air while producing its output. The private costs to the firm reflect only the costs of producing their product. They do not take into account the social costs of air pollution including injuries to the health of nearby residents, decline in surrounding property values and a diminution in the aesthetic value of life in the community.

A popular argument is made that in the above example the polluter should be held liable for the damage done. The community would be better off if the factory owner were forced to reduce the polluting emissions and/or compensate the injured parties. In other words, the polluter would be forced to internalize the social costs of pollution.

Under the Coasian assumptions, a more optimal allocation of resources could be attained no matter which party, the polluter or the members of the community, were held liable for the damage. Using our pollution example, if smoke from factories dirties the linen of nearby laundries, the reciprocal nature is such that if there were no factories, there would be no smoke; however, if there were no laundries in the area, there would be no dirty linen. Thus, under the Coasian assumptions of no legal impediments to bargaining and zero transaction costs,[5] the same allocation of resources would result from negotiation between the parties no matter which party were assigned "fault" for the damage. In our above example, if liability were assigned to the factory (which assumes the right to clean air on the part of others), the factory owner could pay the laundries to relocate; if, on the other hand, the laundry operators were assigned liability (the factory being given the right to pollute), the laundries could pay the factory owner to install pollution control equipment.

Regardless of the initial assignment of liability, the parties will bargain until they exhaust all the "gains-from-trade" and "the outcome of the subsequent bargaining will be that which maximizes the value of output."[6] (Italics mine.)

The problem of monopoly behaviour can also be analysed in the Coasian framework because the costs involve the same reciprocal nature as the costs of external effects.[7] Anti-combines laws prohibit restraints of trade, compelling the monopolist to forego his monopoly profits and behave in a competitive manner. The existence of such laws gives the consumer an entitlement to the economic benefits derived from the workings of a market free from such monopolistic restraints. If legislation did not exist, consumers would have no such entitlement and the monopolist would be free to exploit or overcharge consumers in any way he chose. However, consumers could pay the monopolist to produce a greater output at a lower price by subsidizing him in the amount of his foregone monopoly profits.[8] This subsidy can be illustrated diagramatically using Figure 1.

In Figure 1, consumers could "bribe" the monopolist to produce output Qc at Pc (where Pc=MC) by paying him PcPmAB, his monopoly profits. Consumers would benefit from the increased output and the consequent elimination of the welfare loss, ABC.

This pure "Coasian solution" based on his extremely restrictive assumptions to the problem of monopolistic misallocation dictates allowing the complete free play of market forces and argues against any intervention in the market place.[9] The major limitations of the Coasian analysis is its failure to consider the effects on income distribution.

Distributive Effects

While the proposition that consumers could "bribe" monopolists to produce more will result in allocative efficiency, one cannot ignore the

distributive effect. The payment of a "subsidy" or "bribe" transfers income from the buyer to the monopoly seller. Although economists may stress the allocative objective of competition policy, much of the popular support for an active program of anti-combines enforcement that comes from such groups as farmers, labour and small business is based on their concerns for distributive justice.[10]

If the benefits of anti-combines enforcement include redistribution of income, from monopolist to consumer, action should be taken not only to eliminate the dead-weight loss of monopoly but also to prevent unjust enrichment.[11] Private actions for damages appear to be the best method of recouping the income transfer but this does not preclude public enforcement authorities from considering distributive effects in estimating the returns from any particular enforcement action.

Transactions Costs

Coase assumed initially that transactions were costless. This assumption, he pointed out, was most unrealistic.

> Once the costs of carrying out market transactions are taken into account it is clear that such an arrangement of rights will only be undertaken when the increase in the value of production consequent upon the arrangement is greater than the costs which would be involved in bringing it about...In these conditions the initial delimitation of legal rights does have an effect on the efficiency with which the economic system operates.[12]

In our pollution example, existing legal liability may force the factories to install costly emission control devices even though the laundries could avoid the damage at lower cost by moving away. The cost

of bargaining, however, is so high that it prevents any arrangement whereby the factory owners could induce the laundries to move away to the same extent as they would absent the factories liability. The imposition of liability on the polluter or any measure that forces them to internalize costs (e.g. fines or taxes) is inefficient because the laundries can avoid the damage at lower cost; the high costs of bargaining prevent this more optimal allocation from taking place.

We must now consider the role of transaction costs between parties involved in private antitrust actions. If one of the parties to a potential civil suit is a large group of individuals, the transaction costs indeed may be prohibitive. A class action is the least-cost method of organizing private collective legal action. Since we are only dealing with actions aimed at the elimination of monopolistic misallocation, we frame our analysis of anti-combines enforcement in the context of "public goods".[13]

A public good is characterized by both indivisibility and non-excludability. Indivisibility means that one individual's consumption of a good does not affect the consumption of others - my consumption of anti-combines protection does not diminish yours. Non-excludability means that once the good is provided, it is impossible to exclude anyone else from consuming it as well. Thus, once anti-combines laws are in force and have eliminated "monopoly", it is impossible to exclude persons from consuming in the competitive market.

Because the exclusion principle does not apply to public goods, individuals know they cannot be denied the benefits derived from these goods. They will, therefore, have an incentive to "free-load", or to refuse to reveal their true evaluations of the good through voluntary bids in the market place. The police costs of detecting "free-loaders" are too high, true preferences cannot be determined and the market system breaks down.[14] Consequently, most public goods are provided by the state and are financed through general taxation. A commonly-used example of a public good is national defence.

Assume that a large group of consumers wishes to organize some form of private, collective action against a monopolist who is overcharging them for his product. The conference costs of bringing the group together may be overwhelming. Individuals in the group may have no incentive to undertake the costs of the suit since the outcome and the compensation they receive individually may be independent of their contributions. A class action procedure can minimize these costs and eliminate the problem of "free-loaders".

The conference costs are eliminated with the class procedure because the class representative may commence an action without contacting the class members or obtaining a consensus. The cost of excluding "free-loaders" is irrelevant because absent class members are not liable for court costs if the action fails. In a sense, all absent class members are free-loaders.[15] What is required in any class procedure is that all class members be bound by the results of the action. This is essential if bargaining costs are to be minimized and judicial resources are not to be wasted in excessive litigation.[16] In addition, if the court orders that notice of the action be given to absent class members, such notice must be fairly limited if the administrative costs of the procedure are to be minimized.[17]

The class action procedure minimizes transactions costs between numerous parties. It is, therefore, the least-cost or most efficient method of organizing collective action by large groups. Given this efficiency of the class procedure, the contribution of private, collective action to Canadian competition policy must now be determined.

II: FOOTNOTES

1. Economic Council of Canada, Interim Report on Competition Policy (Ottawa: Queen's Printer, 1969), 8. The Council emphasized that competition is only a single means to achieve efficiency, not an end in itself.

2. Long, Schramm & Tollison, "The Economic Determinants of Antitrust Activity", 16 Journal of Law & Economics 352, 352-53 (1973).

3. Our measure of the dead-weight loss as ABC may understate the actual dead-weight loss due to monopoly. Allocative inefficiency under monopoly may be much larger if monopoly produces higher unit costs i.e. X-inefficiency. See Leibenstein, "Allocative Efficiency v. X-Efficiency", 56 American Economic Review 392 (1966); Comanor & Leibenstein, "Allocative Efficiency, X-Efficiency and the Measurement of Welfare Losses", 36 Economica 304 (1969).

4. Coase, "The Problem of Social Cost", 3 Journal of Law & Economics 1 (1960). Coase's article is the seminal piece in this area and the analysis is generally known as the "Coase Theorem."

5. These are the costs of effecting a transaction. Transaction costs include the costs of disseminating information, the conference costs of getting together, and of negotiating and enforcing a resulting arrangement.

6. They will reach a state that is Pareto optimal. Demsetz, "The Exchange and Enforcement of Property Rights", 7 Journal of Law & Economics 11, 12 (1964).

7. Breit & Elzinga, "Antitrust Enforcement and Economic Efficiency: The Uneasy Case for Treble Damages", 17 Journal of Law & Economics, 329, 334-35 (1974).

8. Buchanan, "External Diseconomies, Corrective Taxes and Market Structure", 59 American Economic Review 174, 176-77 (1969).

9. On this point Calabresi states optimistically:

> We can, therefore, state as an axiom the proposition that all externalities can be internalized and all misallocations, even those created by legal structures, can be remedied by the market, except to the extent that transactions cost money or the structure itself creates some impediments to bargaining.

Calabresi, "Transaction Costs, Resource Allocation and Liability Rules - A Comment", 11 Journal of Law & Economics 67, 69 (1968).

10. Economic Council of Canada, op.cit., note 1, at 6-7.

11. To be discussed below in Chapter III.

12. Coase, op.cit., note 4, at 15-16.

13. Breit & Elzinga, op.cit. note 7, at 331-33.

14. On the exclusion principle, see Musgrave, The Theory of Public Finance (New York: McGraw-Hill Book Co., 1959), 6-12.

15. Wright, "The Cost-Internalization Case for Class Actions", 21 Stanford Law Review 383, 403-04. (1968-69).

16. Ibid. at 411. In the United States, class actions in Federal matters are brought under Rule 23 of the Federal Rules of Civil Procedure (see Appendix B). Rule 23(b)(3) requires that absent class members who do not wish to be bound notify the court of their desire to opt out of the class. For the Canadian Federal Court Rule, see Appendix C.

17. To be discussed in Chapter IV.

III: CLASS ACTIONS AND THE GOALS OF ANTI-COMBINES ENFORCEMENT

Deterrence

While the goals of punishment and deterrence are assumed to be fulfilled by the criminal sanctions of the Combines Investigation Act, the addition of a civil damages remedy plus a right of recovery by way of a class action would increase the overall deterrent effect of anti-combines enforcement in Canada.

The best measure of the deterrence of a class action for damages is the cost to the defendant firm. The firm will be faced with the direct costs of litigation (legal fees) plus the probability of incurring a monetary penalty. In addition, some money value must be placed on the loss of time on the part of senior executives who will be involved in the proceedings. Some account must be taken of the "nuisance cost" of being involved in litigation which may generate bad publicity detrimental to the company's public image. Such publicity could still result in loss of business, even if the firm was subsequently successful in defending an action for damages. The deterrent effect of monetary penalties will be considered first.

The view has been expressed that modern businessmen are highly motivated to avoid engaging in anti-competitive activities which would make them liable to large financial penalties. This view is based on the observation that today's corporate management has a greater aversion to risk than the entrepreneurs of the late 19th and early 20th centuries.[1] This assumption of a risk-averse business community has prompted some economists to suggest that the greatest amount of deterrence from an antitrust policy can be achieved by increasing the monetary penalties for any given violation.[2] This policy results in maximum deterrence at minimum cost as opposed to a program of expanding enforcement resources to increase the detection of violations and the conviction of offenders.[3]

If one assumes that business is indifferent to paying a dollar fine to the state or a dollar's damages to a private plaintiff, the preceding risk analysis can be applied in estimating the deterrence of a civil damages remedy. The introduction of such a remedy into the Combines Investigation Act increases the risk of incurring substantial financial penalties to firms who engage in prohibited activities. The addition of a class action procedure will further enhance this risk because the procedure itself should encourage some litigation that would not be brought on an individual basis, thus increasing the probability or frequency of private actions for damages.

The threat of adverse publicity may act as a deterrent to some firms independent of any monetary consequences resulting from loss of customers.

Much emphasis has been placed on the value of publicity as a deterrent to anti-combines violations. This view was clearly expressed by Mr. Mackenzie King who felt that publication of combines investigations would deter most anti-competitive activities. In the debate on the 1910 Combines Investigation Act, Mr. King, then Minister of Labour, said:

> The one end and purpose of this legislation is to prevent the mean man from profiting in virtue of his meanness, and I know of no way by which that can be more effectively done than by providing some kind of machinery which will enable an intelligent public opinion to be formed and focussed upon the particular evil which you are endeavouring to stamp out. Penalties are frequently of no service towards that end, but publicity is all important and essential,...[4]

Undoubtedly, a large consumer class action has a certain "showcase" effect, and firms may suffer from the notoriety of having been accused of injuring

a large group of unorganized consumers. It is, however, difficult to quantify the deterrent value of this aspect of class actions. In the United States, frequent references are made to the in terrorem effect of class actions but this effect on firms must relate not only to the public image aspect, but also and more importantly, to the large amounts of compensation which firms may be forced to pay.

Critics of the class action procedure in the United States view these showcase features as a form of harassment of legitimate business. Justifiable concern has been expressed that class actions are only directed against wealthy corporations who are capable of paying huge damage awards. While it would be pointless to bring suit against a party who was judgment-proof because of financial inability, it is the restrictive or harmful practice which should be the determining factor for any action, not the ability-to-pay of the corporation. This "nuisance cost" of class actions plus the threat of unmanageable and expensive litigation has led one American commentator to call the procedure "legalized blackmail". Defendants of class suits have no practical alternative but to settle even actions of dubious merit.[5]

In addition, in the United States, the nuisance character of class actions is often attributed to their system of contingent legal fees. The lawyer's fee is directly influenced by the amount of the recovery, that is, all or a substantial proportion of his remuneration is contingent upon the damages awarded or settled upon. This feature of American procedure has led to the criticism that many large class suits are "lawyer instigated" because the lawyer has a much greater financial interest in the outcome of litigation than his client.[6]

Recognizing that the above criticisms of the class action are made in an American context, they would not necessarily apply to a class action procedure adopted in Canada. In the Canadian legal environment, adequate protection against frivolous actions could be afforded by requiring the courts to rule tentatively at the outset of any class action on the merits or *bona fides* before the suit proceeds.

Notwithstanding the deterrent value of publicity, the greatest deterrent to anti-competitive activity is still the cost to the firm of monetary penalties. The provision for a civil damages remedy under section 31.1 of the *Combines Investigation Act* increases the risk of incurring substantial monetary penalties, especially if the civil action is preceded by a criminal conviction. The provision of a class action procedure for recovery will increase the probability of civil actions being brought. Thus, the overall deterrence of anti-combines law in Canada should be increased.

One should note with reference to the United States that private antitrust actions (whether on an individual or class basis) are brought under section 4 of the *Clayton Act* for *treble* damages. The simple damages provision of section 31.1 of the *Combines Investigation Act* would appear at first glance to have a relatively much lower deterrent effect than that of the United States legislation. However, the American antitrust defendant is permitted to deduct as a business expense the full amount of the judgment or damage settlement for income tax purposes unless the private action was preceded by a conviction, plea of guilty or *nolo contendere* in a prior criminal action.[7] Given the U.S. corporate income tax rate of 48 per cent, the damage payment to the firm is reduced by nearly one half. A deduction of one third of the damage payment is permitted even if preceded by a criminal conviction.

It is the view of Revenue Canada officials that damages paid under section 31.1 of the Combines Investigation Act would not be deductible under the Income Tax Act for the purposes of determining income from the taxpayer's business. Therefore, in comparing Canada with the United States, the overall degree of deterrence of the civil damage remedies in the two jurisdictions is probably more similar than as it first appears.

A civil damages remedy plus right of recovery by way of the class action have a positive value as deterrents to anti-combines offences. We must now determine to what extent such an increase in deterrence could change the behaviour of firms. In this regard, two questions must be examined. First, we must consider whether the actual payment of a monetary penalty for combines violations (fines and/or damages) will be passed on to customers. Secondly, will firms take into account the possibility of future civil suits for damages, with the introduction of section 31.1 and a class action provision, in their present pricing policies? To analyse these questions, the imposition of a fine or damage award on a firm is equated to the imposition of a tax. The effect on consumers depends on the degree to which this "tax" on the firm can be shifted.

A fine levied on a firm for a violation of the Combines Investigation Act is like a "lump-sum" tax because the amount of the fine (tax) is independent of the output of the firm.[8] Since the fine is independently determined and is paid out of profits, the price-quantity combination for profit maximization does not change for the firm whatever the state of competition. The fine (tax) would not, therefore, be shifted to consumers.

Similarly a damage payment is like a tax on profits, although it is questionable as to whether it fits the theoretical definition of a lump-sum tax. The amount of damages paid will depend on the number of units of output sold to a certain number

of consumers (the size of the class) over a given period of time. Assuming that the full deterrence of the damage payment is felt by the firm and that the illegal activity is not repeated, the damage payment is, therefore, a "once-and-for-all" outlay. It is essentially a "one-shot" lump-sum tax of 100 per cent on the illegal profits earned. Again, there should be no forward shifting to consumers.

Even if firms do not shift the burden of fines and/or damages onto their customers, the mere introduction of the civil damage remedy and a class action provision into Canadian combines law may affect their behaviour. We have assumed that management is risk averse and have concluded that the new civil damage remedy increases the risk of incurring monetary penalties for combines violations. It is to be expected that this increased risk will cause some reaction among a risk averse business community.

A risk averse management which knows or believes it is violating the Combines Investigation Act will build into their expectations the posibility of future civil actions for damages. They will, therefore, require some "insurance premium" against this risk. This premium will be considered as an addition to their costs. The effect of such an increase can be illustrated diagramatically as the adjustment to a unit tax.

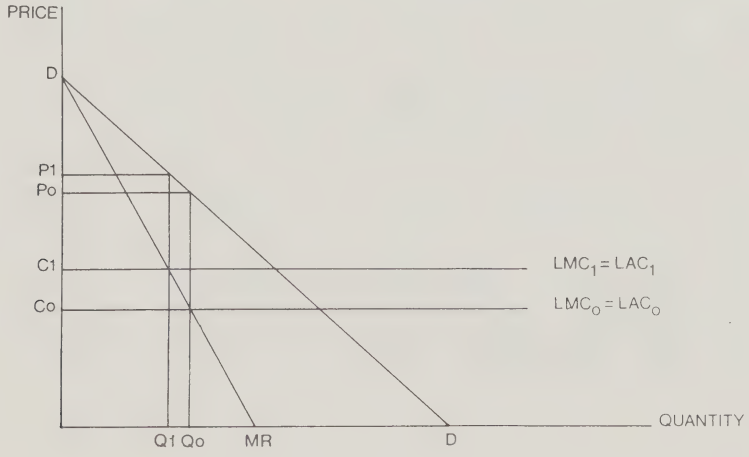

FIGURE 2

Figure 2 shows the adjustment for a monopolist to a per unit excise tax. The pre-tax price is Po. The vertical distance Co - C1 is per unit "insurance premium". The post-tax price is P1. The amount of the increase which is passed on, P1 - Po, depends on the slopes of demand and cost schedules.

Although we cannot readily measure the amount of shifting that may take place, an increase in the deterrent value of anti-combines enforcement could lead to a once-and-for-all price increase by some firms to insure themselves against the greater risk. In the case of civil damage remedies, present-day consumers will be subsidizing the costs (to the firms) of civil actions by future individuals or consumer classes. While the overall effect on the total economy may be small, one cannot ignore these possible allocative and distributive effects of the change in legal rights envisaged by allowing civil actions for damages under the Combines Investigation Act.

Compensation

A primary aim of introducing a civil damage remedy into the Combines Investigation Act was to allow injured parties to receive compensation. In the absence of a class action procedure, however, some injured parties would not seek compensation because the damage they have suffered is too small to warrant the cost of a lawsuit. Proponents of the class action argue that the procedure is the only method that permits such large groups of consumers to recover small losses. A class action provision in the Combines Investigation Act would simply facilitate consumers' access to compensation under section 31.1.

It has already been noted above that compensation to injured parties is necessary for distributive justice, that is, to recoup the income transfer to the monopolist. However, in the context of externalities, some economists have suggested that the payment of compensation to injured parties is inefficient because it reduces their incentives to

avoid the harmful effects or attempt to mitigate their losses. In the factory-laundry example, laundries would not be induced to move from the vicinity of the factory if they received compensation payments. Therefore, the efficient solution is a tax on the externality (smoke) and no compensation to the laundries.[9]

Critics of the treble damage action in the United States have applied this argument to the compensation of antitrust plaintiffs. The "perverse incentives effect" of private antitrust actions removes from the prospective plaintiff any incentive to modify his behaviour in order to avoid harm.[10] Moreover, this perverse effect is exacerbated by the prospect of recovering treble damages rather than simple damages only. However, these criticisms are made in the context of American antitrust law which generally does not require a plaintiff to attempt to mitigate his loss despite some early rulings to the contrary. The judicial rejection of perverse incentives culminated in the refusal of the U.S. courts to accept in pari delicto as a bar to recovery in antitrust damage actions. In Perma Life Mufflers, Mr. Justice Black wrote:

> (though the plaintiff)...
> may be no less morally reprehensible
> than the defendant,...the doctrine
> of in pari delicto, with its complex
> scope, contents, and effects, is not
> to be recognized as a defense to an
> antitrust action.[11]

It is doubtful that these concerns about the "inefficiency" or perverse effect of compensation payments are applicable to the Canadian situation. Anti-combines plaintiffs will not receive the windfall gains associated with treble damage awards, and it is likely that the Canadian courts will require them to demonstrate that they took reasonable steps to mitigate their losses. An exception to this requirement must be made for customers who had been

overcharged at the retail level. It would be impossible for consumers to avoid monopoly overcharges, and indeed, they may be completely unaware of the overcharges until one individual brings suit on their behalf.

On equity grounds, the arguments for compensation are unassailable and the "inefficiency" considerations are not particularly relevant to the Canadian situation. Problems do arise, however, in determining who should receive compensation, that is, the parties who have actually been injured, and in calculating and distributing damage payments to individual class members. These problems are the subject of chapter IV.

Unjust Enrichment

A third goal of anti-combines enforcement that is fulfilled by a civil damages remedy and a class action provision is the prevention of unjust enrichment, a doctrine used in the law of contracts.

It can be argued on equity grounds that anti-combines violators should not be permitted to retain the proceeds of illegal activities. A provision for the payment of simple damages would hopefully at least force firms to pay over the monopoly profits (the income-transfer from consumers) from past offences. Distributive justice is achieved if this payment is used to compensate the parties who were originally injured. However, the goals of compensation and prevention of unjust enrichment can be separated, thus allowing the latter to be fulfilled regardless of who receives compensation. This approach has been adopted in the United States where public officials have sought damages on behalf of citizen-consumers in antitrust suits.[12]

In some instances, the goals of deterrence and prevention of unjust enrichment must be substituted for direct compensation.[13] Chapter IV will examine these situations.

III: FOOTNOTES

1. Galbraith, The New Industrial State (Boston: Houghton Mifflin Company, 1967), 60-97.

2. Breit & Elzinga, "Antitrust Penalties and Attitudes Toward Risk: An Economic Analysis", 86 Harvard Law Review 693, 699 (1973). Briefly their analysis is as follows: Let p be the probability of detection and conviction and f the dollar cost of the monetary penalty. Assume a choice of two antitrust policies: policy A devotes considerable resources to detection and conviction (p = .5) and levies fairly low fines (f = $10,000); policy B on the other hand, devotes few resources to detection and conviction (p = .1) but levies substantial fines (f = $50,000). The expected value of the penalty is $5,000 under both A and B. Individuals, however, will have different expected disutilities from this loss depending on their attitude toward risk. The risk averter would prefer the large probability of a small loss, policy A. He would be deterred from engaging in prohibited activities by policy B which levies substantial monetary penalties but places a low value on detection because to him the disutility of a loss under policy B is more than five times that of a loss under policy A.

3. "Thus in the framework of current attitudes toward risk, the deterrent benefits of a policy of raised fines far outweigh the deterrent benefits of expending additional enforcement resources." Ibid. at 706.

4. Canada, House of Commons Debates, 1909-10, Vol. IV, Col. 6858.

5. Handler, "The Shift from Substantive to Procedural Innovations in Antitrust Suits - Twenty-Third Annual Antitrust Review", 71 Columbia Law Review 1, 8-9 (1971).

6. On the "showcase" features of class suits and the role of the class lawyer, see Dam, "Class Actions: Efficiency, Compensation Deterrence, and Conflict of Interest", 4 Journal of Legal Studies 47, 56-58 (1975).

7. And therefore one can no longer assume that a firm is indifferent to paying a dollar (criminal) fine to the state or a dollar's (civil) damages to an individual as was assumed above in the risk analysis of monetary penalties. On the effect of the U.S. income tax provisions, see Wheeler, "Antitrust Treble-Damage Actions: Do They Work?" 61 California Law Review 1319, 1322 (1971). See also Parker, "Treble Damage Actions - A Financial Deterrent to Antitrust Violations", 16 Antitrust Bulletin 483 (1971).

8. Musgrave, op.cit., note 14, Chap. 2, at 143. While the amount of a fine is at the discretion of the Court, this is not to say that the courts should not take into account the ability-to-pay of the firm or the profits earned from illegal activities.

9. Baumol, "On the Taxation and Control of Externalties", 62 American Economic Review 307 (1972); Breit & Elzinga, op.cit., note 7, Chap. 2 Buchanan, op.cit., note 8, Chap. 2; and Wenders, "Corrective Taxes and Pollution Abatement", 16 Journal of Law and Economics 365 (1973).

10. Breit & Elzinga, op.cit., note 7, Chap. 2, at 335-44.

11. Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968), at 139-40.

12. The actions were brought by state governments as parens patriae. To be discussed in Chapter IV.

13. See Dam, op.cit., note 6, at 60-62. But cf. Posner, "Oligopoly and the Antitrust Laws: A Suggested Approach" 21 Stanford Law Review 1562, 1588 (1969). Posner suggests that simply forcing firms to pay over past profits (simple damages) is not a sufficient deterrent.

IV. THE ADMINISTRATION OF CLASS ACTIONS

Few would deny the validity of the compensation argument for class actions. However, the administration of the procedure may present serious problems - problems sufficiently troublesome to impair the value of the class action as a compensatory device. This situation is most likely to occur where the equity and efficiency arguments for class actions are the strongest, that is, where the class is composed of numerous consumers who have individually suffered very small losses.

Recent experience in the United States with antitrust civil damage actions has shown that class members may go uncompensated because of legal impediments and administrative difficulties. While the major concern of this chapter is the efficient administration of the class procedure, it is worthwhile noting the problem of the indirect purchaser and their standing in civil antitrust suits in the United States.

Passing-on: The Indirect-Purchaser

The typical consumer claim in private antitrust actions in the United States is for damages suffered as a result of illegal price-fixing.

In 1968, in the Hanover Shoe case,[1] the U.S. Supreme Court rejected the defendant's assertion that the plaintiff had not been injured because they had passed on the initial overcharge to their customers, the purchasers of shoes. The Court held that the first purchaser who incurred the overcharge was entitled to recover. In addition, it was impossible to calculate the damages suffered by consumers at the retail level because the Court could not determine what the competitive retail price would have been in the absence of the overcharge at the distributor level. In effect, middlemen or distributors (in the U.S.) who pass on overcharges and then sue for treble damages receive a windfall, recovering first from their customers and then three times from the defendant if their suit is successful.[2]

The passing-on question will presumably also arise in Canada. Canadian courts should accept "passing-on" by middlemen as a defence, permitting consumers who have suffered the actual injury to recover and thus removing the possibility that direct purchasers will receive windfalls.

The courts will face two major problems in dealing with consumer class actions even assuming that indirect purchasers will be granted standing. The amount of damages must be calculated and the damage payments must be distributed to members of the class. These problems detract from the administrative efficiency of the class procedure.

Damages: Calculation and Distribution

In calculating damage done from a price-fixing conspiracy the courts will have to determine in some way what the competitive price would have been in absence of the monopoly overcharges. The problem of measurement may be exacerbated when the damages have been suffered by a large group of individuals. It may, in fact, be economically unfeasible to document or calculate the damage to a large consumer class resulting from collusive overcharges that may have existed for many years. Posner notes:

> The class action, save for large institutional purchasers, is a delusion. There is no feasible method of locating and reimbursing the consumer who several years ago may have paid too much for a toothbrush (or substituted another product) as a result of a price-fixing conspiracy among toothbrush manufacturers.[3]

Not only may the determination of damages suffered by the class be extremely difficult, but the identification of class members and the distribution of awards may be unfeasible. Even in suits involving meritorious claims, the courts may be overburdened by the sheer administrative costs of notifying members of the class and distributing damages.

In the United States, the administrative costs of class suits include the costs of notice to the class. Federal Rule 23 requires adequate notice to class members. This notice requirement is necessary to meet the due process clause of the U.S. constitution. American courts have been required to hold hearings on the problems of notice and the assignment of notice costs. In some cases, placing substantial notice costs on the class representative has resulted in the abandonment of the suit because of the substantial amounts of money involved. The provisions of Rule 23 require the courts to devote considerable time and effort to administrative problems of notice, damage determination and distribution.

In Canada, provisions for reasonable notice need not be as stringent as those dictated by the due process requirements of the U.S. constitution. However, this does not remove from the Canadian courts the burdens of notice, let alone those surrounding the determination and administration of damage awards. It would be economically inefficient to introduce a class action procedure into Canadian anti-combines law to permit large classes of consumers to recover small losses if this resulted in the courts allocating a significant proportion of their scarce resources to the administration of such a procedure.

Even with the stringent notice requirements of Federal Rule 23, class members in the United States have failed to receive compensation because of lack of information, apathy or ignorance. In the recent settlement in the "Antibiotics" case,[4] only 38,000 out of an estimated class of ten million consumers filed claims despite widespread notice through the media. Some class members were sufficiently confused that they thought they were being sued.

This experience in the United States suggests that the adoption of elaborate notice requirements are not cost-justified in terms of actual recovery in cases involving large classes with small losses. Despite widespread advertising the majority of class members, whether through inertia or ignorance, will probably not come forward to press their claims.

A class action procedure which requires substantial notice to class members for the calculation and distribution of damages to the individuals is too costly in terms of the court resources which must be devoted to administration. Such a procedure would no longer minimize transactions costs, thus violating our "efficiency" criterion. The procedure may also fail to put actual compensation into the hands of class members.

Fluid Class Recovery

Recently in the United States a new approach to overcome the problem of calculating individual damage to class members has been suggested. This approach is known as "fluid class recovery" which basically involves the following:

(1) The amount of damages incurred by the class as a whole is determined;

(2) individual class members who come forward are awarded their shares of the damage fund; and

(3) the unclaimed residue is applied to the general benefit of the class under the guidance of the court.

In the United States, the fluid class recovery approach was adopted by the district court in the Eisen case.[5] Morton Eisen brought suit for treble damages on behalf of himself and all other purchasers of odd lot shares of stock (any number of shares under

100) on the New York Stock Exchange. Eisen alleged that the two defendant firms had fixed the odd lot price differential in violation of the Sherman Act. The class consisted of approximately six million people of whom approximately two million were identifiable from the defendants' records.

The court found that the calculation and distribution of damages to such a large class would be extremely difficult and the chances that more than a few class members would come forward to claim their small awards were remote. The court, therefore, decided that the gross damages would be calculated from the defendants' records and that those class members who came forward would be paid. The unclaimed portion of the damages fund could be used to reduce the costs of future odd lot transactions.[6] However, Judge Tyler's liberal interpretation of Rule 23 was rejected by the Second Circuit Court on appeal. The court held that fluid class recovery violated Rule 23 and due process.[7]

While fluid class recovery may simplify the calculation of damages done to the class, and the problems of individual distribution, the manner in which the unclaimed residual is distributed may have severe allocative effects.

In Eisen, Judge Tyler suggested that future prices be reduced until the damage fund was exhausted. But any distribution that affects prices will affect the economic behaviour of the defendants and the current class members. Court-ordered price reductions may have serious allocative effects. The reduced prices may attract business away from other firms thus changing the competitive conditions in the industry. The defendant firm may end up in an even better position than its competitors who had not engaged in the illegal activity. Members of the class may recover twice: once through presenting their claims to the court; and then, once again, through the price reductions. Finally, the reduced prices may attract new customers who will benefit from the disposition of the damage award even though they were not members of the original class.

The economic consequences of any form of fluid class recovery must be given serious consideration. Such forms of disposition should be limited to situations where the effects on industry conditions are expected to be minor. In cases involving local monopolies (e.g., public utilities) application of the residual damages to future prices would have only minimal effects. Class members could be easily identified through the firm's billing system and the price reductions could be applied to customer statements. This situation, however, is highly restrictive and it is unlikely that the typical consumer class action will satisfy all the desirable criteria to permit fluid class recovery.

Parens Patriae Suits

Another approach has been adopted in the United States that would provide deterrence to antitrust violations, prevent unjust enrichment and, at the same time, enable some class members, sufficiently motivated to bring forth their claims, to recover damages. Two State governments have brought antitrust treble damage actions as parens patriae.[8]

In Hawaii v. Standard Oil Co.,[9] the U.S. Supreme Court held that the treble damages provision of the Clayton Act did not permit Hawaii to sue for injury to its general economy allegedly attributable to a violation of the antitrust laws. The Court found that the damage to the general economy was composed of damage to individual citizens of Hawaii. Federal Rule 23 enabled these citizens to seek redress through a class action. The Court noted with approval, however, that the District Court had not held that a state lower case could never bring a class action on behalf of some or all of its consumer citizens.[10]

In 1973, in California v. Frito-Lay,[11] it was held that the State could not sue and recover damages on behalf of its citizen-consumers. The Court did note that the state's intention was a valid public purpose. It said:

> The state most persuasively argues that it is essential that this sort of proceeding be made available if antitrust violations of the sort here alleged are to be rendered unprofitable and deterred. It would indeed appear that the state is on the track of a suitable answer (perhaps the most suitable yet proposed) to problems bearing on antitrust deterrence and the class action as a means of consumer protection. We disclaim any intent to discourage the state in its search for a solution. (Italics mine).[12]

Canadian experience with parens patriae in actions is limited. In Att'y-Gen'l for Ontario v. Canadian Wholesale Grocers Ass'n.,[13] the Attorney-General sought an injunction and damages for certain acts of criminal conspiracy that would have had the effect of restraining trade and injuring the public at large. With respect to the right of the Attorney-General to seek an injunction, Meredith, C.J.O., cited an English case, Attorney-General v. Oxford, Worcester, & Wolverhampton R. Co. (1854), 2 W.R. 330, where it was said: "'The Attorney-General as parens patriae, might apply to the Court to restrain the execution of an illegal act of a public nature provided it was established that the act was an illegal act, and it affected the public generally.'" But he continued: "In the case at Bar, the act complained of is not done by a public body, nor is it of a public nature."[14] Nor was the Attorney-General entitled to damages. On this, Hodgins, J.A., said: "But I do not see that the Attorney-General can recover damages arising out of a public wrong such as this. These damages

belong if suffered to individuals and not to that abstraction known as 'the public'."[15]

In the United States, government intervention as parens patriae in actions for damages has been made on the basis that harm done to the citizens, or the public, injures the general economic welfare of society. In other words, recognition has been given to the concept of the welfare loss due to monopoly which was discussed in Chapter II.

One is still faced, however, with the problem of calculating damages. That is: "If the state is permitted to recover damages to the 'welfare' of its citizens or 'economy' of the state, what are the constituent elements of such damages in economic terms and how can they be measured?"[16] In a simple case of price fixing, the welfare loss due to the overcharge would be equivalent to the welfare loss of a unit excise tax. The reduction in effective demand would depend on the degree to which consumers could substitute other goods for the higher priced "monopoly" output.

Critics of this "welfare loss" analysis maintain that it would be impossible for the courts to calculate the economic damage done. In essence, the judicial system would be forced to measure the social costs of the antitrust violations. Perhaps these criticisms serve to indict the failure of economic science to tackle the theory of damages rather than the inability of the judicial system to analyse the economic consequences of anti-competitive practices.[17]

These criticisms notwithstanding, a recognition of the welfare loss borne by society is a sufficient condition for state intervention.[18] However, in the United States, a prime impetus to parens patriae suits and proposed legislation in this area has been the failure of Rule 23 to provide sufficient redress for consumer classes, especially following the Eisen decision. The parens patriae action, therefore, appears to be the administratively efficient procedure

in cases where class suits could not be economically maintained (basically in cases of a large class with minor damages).

The protection of the public interest and the general economic welfare is the basis of Canadian competition policy. The state, therefore, has an interest in facilitating any procedure whereby consumers could seek compensation for damages suffered as a result of anti-combines offences. In situations where the private class action fails as a compensatory device because of administrative difficulties, the public authorities should assume the role of class representative in the name of efficiency and for the protection of Canadian consumers.

Private v. Public Enforcement

It can be argued that allowing the state to sue for damages suffered by a class of its citizens as a result of anti-competitive activities obviates the necessity of permitting any private action. The state could simply exact a monetary penalty to be paid into the public treasury. We must, therefore, consider the relative merits of public and private enforcement of laws against anti-competitive practices.

The United States has had a long history of private enforcement of antitrust laws. The private treble damage action, which has been called the "strongest pillar"[19] of American antitrust law enforcement, accounts for the overwhelming proportion of all antitrust actions filed annually.

Antitrust Cases Commenced,
Fiscal Years 1960 through 1972[20]

Fiscal year	Total	Government Cases		Private Cases	
		Civil	Criminal	Electrical equipment Industry	Other
1960	315	60	27	-	228
1961	441	42	21	37	341
1962	2,079	41	33	1,739	266
1963	457	52	25	97	283
1964	446	59	24	46	317
1965	521	38	11	29	443
1966	770	36	12	278	444
1967	598	39	16	7	536
1968	718	48	11	-	659
1969	797	43	14	-	740
1970	933	52	4	-	877
1971	1,515	60	10	-	1,445
1972	1,393	80	14	-	1,299

The above table shows that antitrust activity involving U.S. government cases represents only a small fraction of total enforcement. The actual contribution of private actions to total enforcement may be overstated, however, because more than one private suit may arise from one violation.[21] This problem of double-counting does not detract from the prominent role played by private antitrust actions in the United States.

The development of a similar situation in Canada with the addition of a private civil damage remedy to the Combines Investigation Act is unlikely. The treble damages provision of the Clayton Act in the United States offers a much greater inducement to private suits. This incentive is reinforced by the existence of contingent legal fees for lawyers. The plaintiff in a private antitrust action may not have to pay his attorney anything if unsuccessful. In contrast, in Canada, a plaintiff can only recover simple damages under section 31.1 of the Combines Investigation Act if successful and may be liable

for costs if he fails. The problem of costs in a class action for damages, where individual recovery may be extremely small, may serve as a positive disincentive to litigation.[22]

Section 31.1(2) of the Combines Investigation Act provides that the record of proceedings leading to a prior criminal conviction under the Act may be used in civil proceedings under section 31.1(1). The ability to rely on evidence obtained in criminal actions may serve as an incentive to private actions; then again, the absence of a government action against a particular violation may discourage plaintiffs with legitimate grievances from commencing timely proceedings.

Given a maximum possible recovery of simple damages and the current cost rules, little incentive is offered to the private antitrust litigant in Canada. This situation will be positively discouraging if the plaintiff represents a large class who have suffered only small losses. If prior criminal convictions under the Combines Investigation Act are considered to be practically a prerequisite to private actions, there will be few violations of the Act that will be policed initially by private individuals. Assuming that public and private actions will move in "lock-step" with each other, we must question whether, with such a duplication of effort and consumption of judicial resources, it would not be more economic to combine the two actions at the outset. Such a combination of public and private actions can be justified where the cost of private enforcement is too high relative to the recovery or compensation received.[23]

The class action procedure fails in exactly this situation. The administrative costs of determining and distributing damages are too high relative to: (1) the amount each individual will recover; and (2) the number of class members who will actually come forward to present their claims.

This is not an outright rejection of the principle of compensation which is one purpose of a civil damage remedy in the Combines Investigation Act. Rather, it is simply that in certain situations, the class action procedure does not minimize costs, including the actual costs of litigation and the use of the court system which is provided at public expense. While the class action is the most efficient method of organizing collective action, the private enforcement of small consumer claims is too costly in terms of real resources. The goals of deterrence and the prevention of unjust enrichment of defendants should be achieved by some form of public action.[24]

IV: FOOTNOTES

1. Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968).

2. The Court recognized an exception would be where the middleman or distributor operated on a cost-plus or fixed mark-up basis. In this case, the "passing-on" defence would be acceptable. Ibid. at 494.

3. Posner, op.cit. note 13, Chap. 3, at 1590. Under the new section 31.1 of the Combines Investigation Act, actions for damages must be brought within two years of the date of the offence, or within two years of the date of the final disposition of related criminal proceedings. The two-year limitation period for private actions is thus revived by a criminal prosecution.

4. State of West Virginia v. Chas. Pfizer & Co., Inc., 314 F. Supp. 710 (S.D.N.Y. 1970), aff'd, 440 F. 2d 1079 (2d Cir.), cert. denied, 404 U.S. 871 (1971). The lack of response on behalf of the consumer class members was ironic especially as the settlement was praised as: "...the first time that individual consumers - those who actually paid the overcharge caused by a defendant's antitrust violations - will participate in an antitrust settlement." 314 F. Supp. at 728.

5. Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253 (S.D.N.Y. 1971).

6. Ibid. at 262-65.

7. 479 F. 2d 1005 (2d cir. 1973). The U.S. Supreme Court affirmed the Second Circuit Court's decision on different grounds. 94 S. Ct. 2140 (1974).

8. Originally parens patriae was the "royal prerogative" or powers exercised by the sovereign as general guardian of infants, idiots and lunatics, and as superintendent of all charities. This power passed to the state governments in the

United States after the Revolution. Parens patriae also refers to those powers exercised by the States in their quasi-sovereign as opposed to their proprietary interests.

9. 405 U.S. 251 (1972).

10. Ibid, at 266.

11. 474 F. 2d 774 (9th Cir. 1973).

12. Ibid. at 777. The parens patriae bills now being considered by the U.S. Senate and House may in part be a response to the judicial invitation in Frito-Lay. (See Appendix D). Their future, however, is most uncertain as noted by Neil Williams in Damage Class Actions Under the Combines Investigation Act 125 B n. 18 (1975).

13. (1923) 2 D.L.R. 617 (Ont. C.A.).

14. Ibid. at 627.

15. Ibid. at 647.

16. Lanzillotti, "Problems of Proofs of Damages in Antitrust Suits", 16 Antitrust Bulletin 329, 345 (1971). Lanzillotti presents an economist's view of parens patriae suits.

17. For some suggested methods for measuring damages see Parker, "Measuring Damages in Federal Treble Damage Actions", 17 Antitrust Bulletin 497 (1972).

18. See Homburger, "Private Suits in the Public Interest in the United States of America", 23 Buffalo Law Review 343, 349 (1974). "The public interest in the prosecution of a class action is far greater than in ordinary civil litigation."

19. Loevinger, "Private Action - The Strongest Pillar of Antitrust", Antitrust Bulletin 167 (1958).

20. Annual Report of the Director of Administrative Office of the United States Courts for the Fiscal Year Ended June 30, 1972 (Washington, D.C.: U.S. Government Printing Office, 1973), 187, (notes omitted).

21. Posner, "A statistical Study of Antitrust Enforcement", 13 Journal of Law and Economics 365, 372-73 (1970).

22. The important role of costs is discussed extensively by Williams, op.cit., note 12.

23. Landes & Posner, "The Private Enforcement of Law", 3 Journal of Legal Studies 1, 31-32 (1975). The authors note that the existing legal system has left those areas of law (tort, contract, property) to private individuals, consistent with their analysis that private enforcement is efficient where the probability of detection is close to unity and the cost of enforcement is low relative to the value of the victim's claim. The legal claims market of private enforcement breaks down, however, in some instances. "A good example is a price-fixing conspiracy that imposes a small cost on each member of a large class of buyers. The total social costs of the violation may be high, so that enforcement would be socially efficient, but none of the victims has a sufficiently large stake to be willing to bear the expenses of suit. The consumer class action is a device, although an oblique and imperfect one, for overcoming this problem. In effect the property rights normally possessed by the victims of a violation are re-assigned to the lawyer for the class."

24. Since sufficient resources for optimal public enforcement are not available, private enforcement of anti-combines law complements the efforts of the public enforcement bodies. It is only in the case of the large class/small loss where it is suggested that public actions should act as a substitute and, even then, this enforcement will be limited by the public funds available.

V. CONCLUSIONS

The purpose of this paper was to analyse the economic aspects of class actions in relation to their inclusion in future amendments to the Combines Investigation Act.

Many of the arguments for and against class actions referred to in the paper relate to the United States' experience. It is, therefore, useful to note certain features of the American situation:

(1) Federal Rule 23, the requirements of which must be satisfied by all class actions relating to violations of the federal antitrust laws;

(2) the constitutional requirement of "due process" which influences the interpretation of adequate notice to the class under Rule 23;

(3) a statutory provision for the recovery of treble damages in antitrust actions;

(4) contingent legal fees which critics of the class action believe give attorneys a vested interest in class suits above and beyond the interests of their client, the class representative.

The extent to which the arguments and criticisms made in an American context may be applicable in Canada has been discussed. Recognizing the differences between the two legal systems, it is still useful for Canadian policy-makers to analyse thoroughly the experience with class actions in the United States.

The basic conclusions of the paper are summarized below.

Efficiency. The class action procedure minimizes transactions costs. It is the most efficient method of organizing private, collective legal action against the misallocation of resources due to monopoly or other restraints of trade.

Deterrence. The inclusion of a class action procedure in the Combines Investigation Act will increase the overall deterrence of anti-combines enforcement because the risk of incurring substantial monetary penalties will be increased to firms engaging in anti-competitive activities.

Unjust enrichment. A civil damages remedy will prevent firms from retaining the proceeds of illegal activities - a requirement of distributive justice.

Compensation. A class action procedure will increase the facility with which groups of consumers can obtain compensation. Actual compensation is an absolute requirement if distributive justice is to be achieved.

Administrative problems. In cases involving large classes who have individually suffered small losses, the class procedure fails to satisfy our requirements of procedural efficiency and distributive justice. The costs of distribution are too high relative to actual recovery. An undue burden is also placed on the judicial system.

Fluid class recovery. Except in very restricted situations, "fluid class recovery" disposition of damage awards is inappropriate because of its allocative effects.

Public enforcement. In cases involving large classes with small losses, some form of public action is the most efficient solution to provide for maximum deterrence and the prevention of unjust enrichment which are desirable goals of private enforcement.

Any legislative provision for a class action procedure in relation to violations of the Combines Investigation Act must take into account certain procedural matters that will satisfy our efficiency criterion while providing maximum deterrence and compensation. The following are some proposals for such a procedure.

Administrative costs. Any class action procedure must minimize transactions costs and the costs of administration. Therefore:

(1) notice costs must be kept to the minimum; and consistent with principles of natural justice;

(2) all class members must be bound.

Disposition of damages. The appropriateness of fluid class recovery is limited because of the possible allocative effects. If the calculation of gross damages to a class is the only viable method of determining damages:

(1) the unclaimed residue of any damage award should revert to the Crown.

This will provide economy in administration and avoid possible indirect effects on competitive conditions in the industry.

Public Actions. In cases involving large classes with small losses, the private class action is economically unfeasible - the cost of enforcement is too high relative to the claims. In these situations:

(1) the Director of Investigation and Research or some suitable Federal or Provincial public official should bring the action;

(2) the damages recovered should be paid into the public treasury; and

(3) the public suit should pre-empt any further private suits for the same cause.

The main problem of implementing this recommendation would be the establishment of criteria for a "large class" and a "small loss". An additional problem would arise if the class were made up of sub-classes where the majority of class members suffered minimum damage but a small minority had large losses. This type of situation arose in the "Antibiotics" case in the United States.[1]

In addition, the authority to make the decision as to whether a particular class action should proceed as a private suit or be given over to a public official would also have to be identified. Such a decision would be basically a ruling on the manageability of the action. It would be just as inefficient to require a public official to proceed with a basically unmanageable action as to permit a private individual to bring the suit.

Other criticisms may be made of a program which establishes a dichotomy between public and private class actions. Not permitting compensation to members of certain classes is inequitable and unjust, and if compensation is not forthcoming, the rationale for permitting private civil enforcement is somewhat weakened. More importantly, a civil damage award paid into the public treasury is like a fine. In this case, the Crown could be accused of trying to impose criminal liability in a civil action where the degree of proof required is much less. Indeed, this raises the whole question of the role of the Crown in the civil enforcement of anti-combines law in Canada. These procedural and legal implications notwithstanding, a public action is the only economically efficient method of resolving by means of civil action the problems of the large class/small loss situation.

Given the above constraints, a class action provision permitting consumer groups to sue collectively for damages can play a useful role in Canadian competition policy. However, we cannot predict with any certainty, at this point in time, the extent to which individuals will avail themselves of the new procedure.

Most antitrust class actions in the United States are brought in cases involving price-fixing or franchise operations. These offences seem most suited to the class remedy. We cannot expect large numbers of anti-combines class actions upon the introduction of legislation in Canada. However, as the courts gain expertise and consumers become aware of such a new mode of redress, we may see the class action utilized as a viable tool of anti-combines enforcement against those anti-competitive practices where private, collective action is an efficient method of correcting the misallocations due to these offences and at the same time, permits consumers to receive compensation for the damages incurred.

V: FOOTNOTES

1. op.cit., note 9, Chap. 4.

APPENDIX A

SECTION 31.1 OF THE COMBINES INVESTIGATION ACT

(1) Any person who has suffered loss or damage as a result of:

(a) conduct that is contrary to any provision of Part V, or

(b) the failure of any person to comply with an order of the Commission or a court under this Act,

may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

(2) In any action under subsection (1) against a person, the record of proceedings in any court in which that person was convicted of an offence under Part V or convicted of or punished for failure to comply with an order of the Commission or a court under this Act is, in the absence of any evidence to the contrary, proof that the person against whom the action is brought engaged in conduct that was contrary to a provision of Part V or failed to comply with an order of the Commission or a court under this Act, as the case may be, and any evidence given in those proceedings as to the effect of such acts or omissions on the person bringing the action is evidence thereof in the action.

APPENDIX B

RULE 23 OF THE U.S. FEDERAL RULES OF CIVIL PROCEDURE

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequsites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

As amended Feb. 28, 1966, eff. July 1, 1966.

APPENDIX C

RULE 1711 OF THE CANADIAN FEDERAL COURT RULES

Class action

Rule 1711. (1) Where numerous persons have the same interest in any proceeding, the proceeding may be begun, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.

(2) At any stage of a proceeding under this rule, the Court may, on the application of the plaintiff, and on such terms, if any, as it thinks fit, appoint any one or more of the defendants or other persons as representing whom the defendants are sued to represent all, or all except one or more, of those persons in the proceeding; and where, in exercise of the power conferred by this paragraph, the Court appoints a person not named as a defendant, it shall make an order adding that person as a defendant.

(3) Where an order is made under this rule, it shall contain directions as to consequential pleadings or other steps and any interested party may apply for supplementary directions.

(4) A judgment or order given in a proceeding under this rule shall be binding on all the persons as representing whom the plaintiffs sue or, as the case may be, the defendants are sued, but shall not be enforced against any person not a party to the proceeding without leave of the Court, which leave will only be granted on an

application notice of which has been served personally upon the person against whom it is sought to enforce the judgment or order.

(5) Notwithstanding that a judgment or order to which any such application relates is binding on the person against whom the application is made, that person may dispute liability to have the judgment or order enforced against him on the ground that by reason of facts and matters particular to his case he is entitled to be exempted from such liability.

(6) The Court hearing an application for leave under subparagraph (4) may order the question whether the judgment or order is enforceable against the person against whom the application is made to be tried and determined in any manner in which any issue or question in an action may be tried and determined.

APPENDIX D

PARENS PATRIAE PROVISIONS OF S.1284 AND H.R. 8532

1. S. 1284, 94th Cong., 1st Sess. #401 (1975). Section 401 of S. 1284 contains the parens patriae provisions to be added as the new section 4C(a) of the Clayton Act. Reported by Mr. Philip A. Hart, with amendments, on July 28, 1975.

TITLE IV-PARENS PATRIAE AMENDMENTS

Sec. 401. The Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (38 Stat. 730: 15 U.S.C. 12), is amended by inserting immediately following section 4B the following new sections:

"ACTIONS BY STATE ATTORNEYS GENERAL"

"SEC. 4C(a)(1) Any attorney general of a State may bring a civil action in the name of such State in any district court of the United States having jurisdiction of the defendant, to secure monetary and other relief as provided in this section in respect of any damage sustained, by reason of the defendant's having done anything forbidden in the Sherman Act, by -

"(A) the natural persons residing in such State, or any of them; or

"(B) the general economy of such State or the political subdivisions thereof, or any of them, as measured by any decrease in revenues or increase in expenditures, or both, of such State or political subdivision,

that may with reasonable probability be casually related to the antitrust violation: Provided, That no monetary relief shall be awarded to the State in respect of such damage that duplicates any monetary relief awarded to the State pursuant to subsection (a)(1) of this section.

2. H.R. 8532, 94th Cong. 1st Sess. #2 (1975). Section 2 of H.R. 8532 contains the parens patriae provisions to be added as the new section 4C(a) of the Clayton Act. Reported to the Committee of the Whole House by Mr. Rodino on September 22, 1975.

ACTIONS BY STATE ATTORNEYS GENERAL

Sec. 4C(a) Any State attorney general may bring a civil action, in the name of the State, in the district courts of the United States under section 4 of this Act, and such State shall be entitled to recover threefold the damages and the cost of suit, including a reasonable attorney's fee, as parens patriae on behalf of natural persons residing in such State injured by any violation of the antitrust laws.

(b) In any action under subsection (a), the court may in its discretion, on motion of any party or on its own motion, order that the State attorney general proceed as a representative of any class or classes of persons alleged to have been injured by any violation of the antitrust laws, notwithstanding the fact that such State attorney general may not be a member of such class or classes.

(c) In any action under subsection (a) the State attorney general shall, at such time as the court may direct prior to trial, cause

notice thereof to be given by publication in accordance with applicable State law or in such manner as the court may direct; except that such notice shall be the best notice practicable under the circumstances.

(d) Any person on whose behalf an action is brought under subsection (a) may elect to exclude his claim from adjudication in such action by filing notice of his intent to do so with the court within sixty days after the date on which notice is given under subsection (c). The final judgment in such action shall be res judicata as to any claim arising from the alleged violation of the antitrust laws of any potential claimant in such action who fails to give such notice of intent within such sixty-day period, unless he shows good cause for his failure to file such notice.

(e) An action under subsection (a) shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given in such manner as the court directs.